

SUPREME COURT OF THE UNITED STATES

NOTICE OF HEARING **1933**

No. 211

**THE OKMOTAW, OKLAHOMA & GULF RAILROAD COM-
PANY AND THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, APPELLANTS,**

**E. W. MACKAY, AS COUNTY TREASURER OF HUGHES
COUNTY, OKLAHOMA; THE CITY OF HOLDENVILLE
ET AL.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

FILED NOVEMBER 14, 1933

(37,406)

(27,404)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 649.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY AND THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

B. W. MACKEY, AS COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA; THE CITY OF HOLDENVILLE
ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1919, of said Court, before the Honorable William C. Hook and the Honorable John E. Carland, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twenty-second day of July, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, et al., were Appellants, and The Choctaw, Oklahoma & Gulf Railroad Company, et al., were Appellees, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:



IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE RALPH E.
CAMPBELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOL-
LOWING ENTITLED CAUSE:

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COM-
PANY and THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, - - - - - *Complainants,*

Equity

vs.

No. 1913

B. W. MACKEY, as County Treasurer of Hughes County,
Oklahoma, THE CITY OF HOLDENVILLE, a Municipal
Corporation, and CÉILAN M. SPITZER, ADELBERT L.
SPITZER, HORTON C. RORICK and CARL B. SPITZER,
Partners in Trade, Doing Business Under and in the Name
of SPITZER, RORICK & COMPANY, - - *Defendants.*

B. W. MACKEY, as County Treasurer of Hughes County,
Oklahoma, THE CITY OF HOLDENVILLE, a Municipal
Corporation, and HORTON C. RORICK, ADELBERT L.
SPITZER and CARL B. SPITZER, Partners in Trade,
Doing Business Under the Firm Name and Style of
SPITZER, RORICK & COMPANY, and MADISON G.
BALDWIN, - - - - - *Appellants,*

vs.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COM-
PANY, a Corporation, and THE CHICAGO, ROCK
ISLAND & PACIFIC RAILWAY COMPANY, a Cor-
poration, - - - - - *Appellees.*

In the District Court of the United States Within and For the Eastern District of the State of Oklahoma. The Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company, Complainants, v. B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, the City of Holdenville, a Municipal Corporation, and Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, Partners in Trade, Doing Business Under and in the Name of Spitzer, Rorick & Company, Defendants. --In Equity, No. 1913.

Bill of Complaint.

To the Honorable, the District Court of the United States, within and for the Eastern District of the State of Oklahoma:

Your Orators, The Choctaw, Oklahoma & Gulf Railroad Company, a corporation organized and existing under, by and in pursuance of an Act of the Congress of the United States, and The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a citizen and resident of the States of Illinois and Iowa, having its principal office and place of business at the City of Chicago, in said State of Illinois, brings this, its Bill of Complaint, against B. W. Mackey as County Treasurer of Hughes County, State of Oklahoma, who is a resident and citizen of said Hughes County, Oklahoma, in said Eastern District of Oklahoma, and the City of Holdenville, a municipal corporation of the first class, organized and existing under the laws of the State of Oklahoma, located in Hughes County, Oklahoma, in said Eastern District of Oklahoma, and Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, partners in trade under and in the name of Spitzer, Rorick & Company, who are citizens and residents of the City of Toledo, County, State of Ohio, and thereupon complains and says:

First:

Your Orators aver that The Choctaw, Oklahoma & Gulf Railroad Company is now and was at all the times hereinafter mentioned, and for many years heretofore has been, a corporation organized and existing under, by and in pursuance of an Act of the Congress of the United States, as will be hereinafter more fully set out, and is a non-resident and is not a citizen of the said State of Oklahoma; that The Chicago, Rock Island and Pacific Railway Company is now and was at all the times hereinafter mentioned, and for many years hereto-

fore has been, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a resident and citizen of the States of Illinois and Iowa, having its principal place of business at the City of Chicago, in said State of Illinois and is not a resident or citizen of the State of Oklahoma; that the defendant B. W. Mackey is the duly elected, qualified and acting County Treasurer of Hughes County, State of Oklahoma, and a resident and citizen of said Hughes County, Oklahoma, in said Eastern District of Oklahoma; that the defendant the City of Holdenville is a municipal corporation of the first class, organized and existing under the laws of the State of Oklahoma and is located in Hughes County, Oklahoma, in said Eastern District of Oklahoma; that the defendants Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer are citizens of the State of Ohio and residents of the City of Toledo, County of in said State.

Second:

Your Orators further aver that this suit is an action of a civil nature; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3,000.00), and that the controversy herein is a controversy wholly between citizens of different states and a corporation organized and existing under and by virtue of an Act of Congress.

Third:

Your Orators further aver that on the 28th day of November, 1887, there was organized under and pursuant to the laws of the State of Minnesota, a corporation called the Choctaw Coal and Railway Company, which was empowered, among other things, to mine, sell, market and deal in coal, iron and other ore and the products thereof, to manufacture coke, charcoal, pig iron and various other metals; to buy, lease, deal in and work mineral lands, and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or development of any mine or quarry owned or operated by it, as more fully appears from copies of the charter of said corporation and amendments thereto, hereto attached and marked "Exhibit A," and hereby made a part hereof as fully as if set forth herein, and as further appears from the laws of said State of Minnesota, under and pursuant to which said corporation was organized.

Fourth:

That by an Act of Congress approved on to-wit, February 18, 1888, the Choctaw Coal and Railway Company aforesaid

was empowered and authorized to construct and maintain a railway, telegraph and telephone line through what was then Indian Territory, from a point on the Red River, at or near the bluff known as Rock Cliff on the southern boundary of said Territory and running thence by the most feasible and practicable route through said Territory to a point on the eastern line contiguous to the west boundary line of Polk and Sevier Counties in the State of Arkansas, and also to construct and maintain a branch line of railway to extend from some suitable point on the above line of railway in a northwesterly direction to the leased coal veins of said Choctaw Coal and Railway Company, situated in what was then Tobucksey County, Choctaw Nation, and from thence by some practicable route to the intersection with the Atchison, Topeka and Santa Fe Railway between Halifax station and Bear Creek, otherwise known as the North Fork of the Canadian River, all as more fully appears from said Act of Congress and an amendment thereof, approved February 13, 1889.

Fifth:

That pursuant to its charter and the foregoing Acts of Congress, the Choctaw Coal and Railway Company proceeded to develop coal mines upon the leases aforesaid and to construct a railway line connecting therewith for the transportation of the products of said mines; that in the prosecution of its said work said corporation became insolvent and it became necessary for the United States Government to make some provision for the work undertaken by it to be carried on, in order that the leased mines might be operated for the benefit of the Indians as wards of the United States and for the purpose of the development of commerce in the said Territories and among the several States of the Union; that to accomplish said purposes and to secure the operation of said mines for the benefit of the Indians and in the interests of interstate commerce, the United States government, by an Act approved by Congress on to-wit, August 24, 1894, empowered the purchasers of the rights-of-way, railroads, mines, coal leasehold estates, and other property and the franchises of the Choctaw Coal and Railway Company, at any sale made under or pursuant to any decree of court, to form a corporation, and vested in said corporation formed all the right, title, interest, property, possession and claim and demand in law and equity thereof, in and to such rights-of-way, railroads, mines, coal leasehold estates, and property of said Choctaw Coal and Railway Company, together with all the franchises which had been conferred upon said company by any and all Acts of Congress, or which it possessed by virtue of its char-

ter under the laws of the State of Minnesota, all as more fully appears from said Acts of Congress last aforesaid; that pursuant to said last-named Acts of Congress there was organized the complaining corporation the Choctaw, Oklahoma and Gulf Railroad Company; that Section four of the Act last aforesaid (here set out for the convenience of the court) is in words and figures as follows:

"Section 4: That it shall and may be lawful for such new corporation to construct and operate branches from its said railroad and for such purpose to take and use rights-of-way not exceeding one hundred feet in width, upon making compensation therefor as provided for in the case of taking land for its main line, and to lease its railroads and mines and other property to any company owning or operating a railroad connecting with the railroad of said new corporation, on such terms and conditions as may be agreed upon, *provided*, that the right to construct branches, conferred by this section, shall exist and be exercised in the Indian Territory only for the purpose of developing and working the leases mentioned in the Act of Congress of October first, eighteen hundred and ninety."

Sixth.

That the United States Government, by an Act of Congress approved on to-wit, April 24th, 1896, duly recognized the Choctaw, Oklahoma and Gulf Railroad Company, pursuant to the Act approved August 24th, 1894, and further defined and prescribed the rights, powers and duties thereof. Section two of said Act of April 24th, 1896 (here copied for the convenience of the court) is in words and figures as follows:

"Section Two: That the powers conferred by said section four shall extend to branches intended to aid the development of any coal or timber territory contiguous or tributary to the lines of the railroad of the said Choctaw, Oklahoma and Gulf Railroad Company, whether owned or controlled by said company or by others, said branches not to exceed in length five miles, and to the construction and operation of a branch from any point on its existing line of railway to the northern line of the State of Texas, and for this purpose the said company shall have the like rights, powers and franchises, as to the acquisition of a right-of-way and depot grounds, and as to the construction and operation of said branch, and shall be subject to the like conditions and restrictions as it possesses or is subject to under or by virtue of the provisions of the said

Act of August twenty-fourth, eighteen hundred and ninety-four, as to the line of railroad acquired or constructed thereunder."

Seventh:

That pursuant to and in accordance with the Acts of Congress described, the Choctaw, Oklahoma and Gulf Railroad Company purchased and became possessed of and vested with all the right, title, interest, property, possession, claim and demand in law and equity, in and to such rights-of-way, railroads, mines, coal leasehold estates, and with all the rights, powers, immunities, privileges and franchises which had been heretofore granted to said Choctaw Coal and Railway Company, or conferred upon it by any Act of Congress, or which it possessed by virtue of its charter under the laws of the State of Minnesota; and that said Choctaw, Oklahoma and Gulf Railroad Company became possessed of and vested with, in addition to all of the foregoing, such further and additional franchises and rights as were granted to it by the aforesaid Acts of Congress authorizing its organization, as more fully appears therefrom.

Eighth:

That prior to March 24, 1904, the Choctaw, Oklahoma and Gulf Railroad Company, pursuant to and in accordance with its rights, powers, privileges and duties under and by virtue of its charter and the various Acts of Congress heretofore referred to proceeded to construct and acquire and to become possessed of and did construct and acquire and become possessed of the following line of railroad:

A line of railway extending from a point on the west bank of the Mississippi River at or near Hopefield, Crittenden County, Arkansas, opposite Memphis, Tennessee, by way of Little Rock, Pulaski County, Arkansas, to a point on the boundary line between the Territory of Oklahoma and the State of Texas, at or near Texola, Greer County, Oklahoma.

Ninth:

That pursuant to and in accordance with its rights, powers, privileges and duties and by virtue of its charter and the various Acts of Congress, the said Choctaw, Oklahoma and Gulf Railroad Company did locate its said railway from the said leased coal veins of said Choctaw Coal and Railway Company to an intersection with the Atchison, Topeka and Santa Fe Railway, as provided in said Act of Congress of February 18, 1888, and did file its maps and do all things by law required to acquire a right-of-way and station grounds

therefor; that as a part of such right-of-way and station grounds the said Choctaw, Oklahoma and Gulf Railroad Company was granted, under the terms and by virtue of the said Acts of Congress, the following described tract of land, to-wit:

Beginning at a point three hundred two and five-tenths (302.5) feet Northeasterly from the intersection of the main track of said railway company with the West line of Section eighteen (18) Township seven (7) North, Range nine (9) East, measured along said main track; thence Northeasterly at right angles one hundred and fifty (150) feet; thence Southeasterly at right angles parallel to and one hundred and fifty (150) feet easterly from the center of said main track; three thousand feet (3,000); thence Southwesterly at right angles three hundred (300) feet; thence Northwesterly at right angles, parallel to and one hundred and fifty (150) feet westerly from the center of said *mine* track, three thousand (3,000) feet; thence Northeasterly, at right angles one hundred and fifty (150) feet to the point of beginning, lying and being in Section thirteen (13), Township seven (7) North, Range eight (8) East, and Section eighteen (18), Township seven (7) North, Range nine (9) East, Hughes County, Oklahoma.

Tenth:

That under and in pursuance of said Acts of Congress, your Orator, The Choctaw, Oklahoma and Gulf Railroad Company, was vested with an estate in and to the said described premises, and became and was entitled to the full and free possession and use of said premises for the purposes in said Act of Congress provided.

Eleventh:

That on to-wit, March 24, A. D. 1904, The Choctaw, Oklahoma and Gulf Railroad Company, being thereunto duly authorized by an Act of Congress, leased to your Orator, The Chicago, Rock Island & Pacific Railway Company, all its railway lines and appurtenances thereto, including the premises hereinbefore particularly described, and equipment thereof, for a period of 999 years; that your Orator, The Chicago, Rock Island and Pacific Railway Company, under the several Acts of Congress, and by virtue of its chartered rights and the laws of the States of Illinois and Iowa, under which it is incorporated, had full power, right and authority to acquire and hold, by lease, said railway lines as well as to construct, acquire, own, build and operate all the other lines which it now owns and operates within the State of Oklahoma.

That your Orator, the Chicago, Rock Island and Pacific Railway Company, under and by the terms of said lease succeeded to all the rights, powers, facilities, franchises, properties and interests of the said Choctaw, Oklahoma & Gulf Railroad Company in and to said railway lines and became entitled to the full and free use and possession of the said railway lines, properties and rights-of-way, including the premises hereinbefore particularly described, for the full period of said lease.

Twelfth:

That your Orators have constructed and do now maintain on and upon the said rights-of-way and on and upon the premises herein described, railway tracks, both main and sidings, composed of ballast, ties and steel, station houses, freight depots and other necessary appurtenances, which are in constant use in the performance of the charter powers of your Orators.

Thirteenth:

That the premises hereinbefore described, or a portion thereof, are contiguous to and abut upon, at the north and east side thereof, on Oklahoma Avenue, a street or thoroughfare of the defendant, the City of Holdenville.

Fourteenth:

That the defendant, The City of Holdenville, and under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency," approved April 17, 1908, as amended by an Act of said Legislature, approved, 1909, and acting by and through its Mayor and Councilmen, did on the 20th day of January, 1910, adopt a certain resolution, numbered 20, declaring it necessary to pave, grade, drain and curb certain streets of the said city, including a portion of said Oklahoma Avenue, to-wit: "From the intersection of the Frisco and Rock Island right-of-way at the Union Station, to the south-east side of Oak Street," and directing a publication thereof in a newspaper of general circulation for a period of two weeks, and on, to-wit, the 7th day of April, 1910, the said city, acting by and through its said Mayor and Councilmen, did adopt a resolution numbered 23, reciting the publication of said Resolution No. 20, and providing for the pavement of said streets, including the following: "Oklahoma Avenue from the intersection of the Frisco and Rock Island right-of-ways

at the Union Station to the southeast line of Oak Street to be paved thirty feet wide from the face of the curb to the face of the curb," and prescribing the kind of pavement to be used and providing for the reception of bids therefor; and thereafter, and on to-wit, the 2nd day of May, 1910, the said City of Holdenville, by and through its Mayor and Councilmen did receive bids for the construction of said aforesaid pavements and improvements, and on said date did by motion duly made and carried accept the bid of The Shelby-Downard Asphalt Company, of Ardmore, Oklahoma, and authorize the Mayor and Clerk to enter into a contract in accordance with such bid; and thereafter and on, to-wit, the 11th day of May, 1910, did approve and authorize the execution of a certain contract between said City of Holdenville and The Shelby-Downard Asphalt Company covering the said pavements and improvements, and thereafter the said pavements were laid and improvements made.

Fifteenth:

That on, to-wit, the 29th day of June, 1910, the Mayor and Councilmen of the defendant, City of Holdenville, did meet in called session, pursuant to a request and call for a council meeting, as follows, to-wit: "Request for Council Meeting: To F. P. Rutherford, Mayor, City of Holdenville: We, the undersigned Councilmen of the City of Holdenville, Oklahoma, do hereby request you to call a special meeting of the City Council of said city at the council rooms of said city at 5:00 P. M., on the 29th day of June, 1910, said meeting to be held for the purpose of appointing a board of appraisers to appraise and apportion the benefits of the several lots and tracts of land in paving district No. 1, adopting map showing the subdivision of the C., R. I. & P. R. R. property; and accepting the estimate of the City Engineer as to the cost of improvements in paving district No. 1. (Signed) J. J. Pickens, H. C. Hyde, J. L. Adams, Councilmen."

"Call for Meeting.

I, F. P. Rutherford, Mayor of the City of Holdenville, Oklahoma, by virtue of the authority vested in me and pursuant to the above request do hereby call a meeting of the City Council of the City of Holdenville to be held at the time, place and for the purpose as expressed in the above request.

(Signed) F. P. Rutherford,
Attest I. A. Draper, Clerk."

The said notice was duly served upon the members of said council and at said meeting, the following, among other

proceedings, were had, as appears from the recorded minutes of said meeting:

"City Engineer McIntosh presented a map showing the C., R. I. & P. R. R. property to be adopted for the purpose of adopting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

"Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

"Upon a vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Cornish, Nix.

"Motion declared carried and map adopted."

"Resolution No. 25 was presented by the Ordinance Committee and was read by the clerk as follows:

"Resolution No. 25:

Appointing a board of appraisers to appraise and apportion to the several lots and tracts of land in Street Improvement District Number One the benefits resulting from the improvement of the streets constituting said Improvement District in the City of Holdenville, Oklahoma.

Whereas, in pursuance of a resolution adopted on the 20th day of January, A. D. 1910, and other proceedings duly had and taken according to law, a contract has been entered into for the improvement of the following named streets, to-wit:

1. That portion of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railway right-of-way and the right-of-way of the Rock Island Railroad at the Union Station to the southeast side of Oak Street.

* * * * *

Whereas, the total cost of the improvements and the several parts thereof has been ascertained and determined as hereinafter set forth:

Therefore, be it resolved by the Mayor and Councilmen of the City of Holdenville, Oklahoma:

Section 1. That said described portion of Oklahoma Avenue, Oak Street, Cedar Street, Creek Street, Echo Street, Sixth Street, Seventh Street, and the lots and tracts of land to be assessed to pay the cost of said improvements as hereinafter provided, shall constitute Street Improvement District No. One of the City of Holdenville, Oklahoma.

Section 2. That E. F. Messenger, C. E. Arnold and H. G. Barnard, who are disinterested freeholders of the City

of Holdenville, Oklahoma, and not owners of any property to be assessed for said improvements, be and they are hereby appointed a Board of Appraisers to appraise and apportion the benefits resulting from said improvements to the several lots and tracts of land within said Improvement District Number One.

Section 3. That the cost of improving that part of Oklahoma Avenue extending from the intersection of the St. Louis and San Francisco and Rock Island right-of-way at the Union Station to the southeast side of Oak Street, exclusive of the area formed by street intersections and alley crossings, in the aggregate amount of Ten Thousand Six Hundred and Eighty-six Dollars and Seventy Cents shall be assessed against the several lots and tracts of land embraced in Blocks 34, 33½, 44½, 53, 52½, 68, 68½, 79, 78½, including the right-of-way of the Rock Island Railway abutting on said street and which has been platted into quarter blocks districts for the purpose of the appraisalment and assessment as herein provided.

All of which is abutting on said portion of Oklahoma Avenue.

"Section 4. That the cost of improving the area formed by the intersection of Oklahoma Avenue with Echo Street in the aggregate amount of Nine Hundred and Eighty-four Dollars and Thirty-four cents shall be assessed against the lots and tracts of land within the four quarter blocks adjacent thereto.

"Section 5. (Same as Section 4, except relates to intersection of Oklahoma Avenue with Creek Street, aggregating the amount of One Thousand One Hundred Eighty-two Dollars and Forty-six Cents.)

"Section 6. (Same as Section 4, except relates to intersection of Oklahoma Avenue with Cedar Street, aggregating the amount of One Thousand Two Hundred Forty-three Dollars and Eight Cents.)

"Section 7. (Same as Section 4, except relates to intersection of Oklahoma Avenue with Oak Street, aggregating the amount of One Thousand Two Hundred Thirty-one Dollars and Seventy-five Cents.)

* * * * *

"Section 42: That said appraisers shall subscribe the oath prescribed by law and take such steps as may be necessary to make such assessment and appraisalment as is by law required."

The said resolution was duly adopted and the clerk instructed to notify the appraisers of their appointment.

And thereafter, on, to-wit, July 8, 1910, the said Mayor and Councilmen of the City of Holdenville, met in adjourned session, at which the following, among other proceedings, were had, as appears from the recorded minutes of said meeting:

"The appraisers appointed to appraise and apportion to the several lots and tracts of land the benefits in improvement District No. 1, submitted the following report, which was read by the clerk, as follows:

Report of Appraisers.

Oath of Appraisers.

Street Improvement District Number One in the City of Holdenville, Oklahoma.

State of Oklahoma, County of Hughes,--ss.

E. F. Messenger, C. E. Arnold and H. G. Barnard having been appointed a Board of Appraisers by resolution of the Mayor and Councilmen of the City of Holdenville, Oklahoma, on the 29th day of June, A. D. 1910, to appraise and apportion to the several lots and tracts of land chargeable with the cost thereof, the benefits resulting thereto on account of paving and otherwise improving the streets included in said Improvement District Number One in the City of Holdenville, Oklahoma, in accordance with the resolution appointing the said appraisers, being first duly sworn, each for himself, deposes and says that he is a disinterested freeholder of said City of Holdenville, Oklahoma, and not the owner of any property to be assessed for the making of said improvements, and that he will make true and impartial appraisalment and apportionment of the benefits *accuring* to the several lots and tracts of land chargeable with the cost of making said improvements, and that he will make written report thereof and file the same with the City Clerk of said City as required by law and the provisions of said resolution.

(Signed) E. F. Messenger,
C. E. Arnold,
H. G. Barnard.

Subscribed and sworn to before me this the 2nd day of July, A. D. 1910.

(Seal)

Ira A. Draper,
Notary Public.

My Commission expires December 10, 1911.

July 8th, 1910.

To the Honorable Mayor and Councilmen of the City of Holdenville, Oklahoma:

Greeting:

We, the undersigned Board of Appraisers appointed by

resolution of your Honorable Body to appraise and apportion to the several lots and tracts of land chargeable with the cost thereof, the benefits resulting thereto on account of grading, paving, curbing, guttering, and otherwise improving the portions of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railway right-of-way and the Rock Island Railroad at the Union Station extending to the southeast side of Oak Street.

Also that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

Also Cedar Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

Also Echo Street beginning on Oklahoma Avenue and extending to the northeast side of Sixth Street.

Sixth Street beginning on the southeast side of Echo Street and extending to the northwest side of Oak Street.

Also Seventh Street, beginning on the southeast side of Creek Street and extending to the northwest side of Oak Street, exclusive of intersection of Cedar Street.

Also Sixth Street from the southeast side of Oak Street to the northwest side of Gulf Street.

Do hereby certify that we met in the City Hall in the City Engineer's Office, in the City of Holdenville, on the second day of July, 1910, and organized as a Board of Appraisers, and selected E. F. Messenger, as chairman, and H. G. Barnard as clerk thereof. That we at said time severally took and subscribed an oath to make a true and impartial appraisal and apportionment to the several lots and tracts of land designated in the resolution by which we were appointed, and of the benefits resulting thereto, as aforesaid; that within five days after being notified of our appointment, we proceeded to appraise and apportion to said several lots and tracts of land the benefits resulting thereto on account of the making of said improvements; that in making said appraisal and apportionment, we first apportioned to each quarter block its due proportionate charge according to the amount and of work performed upon the abutting streets and other public places, including street intersections and alley crossings, which respective amounts appraised, apportioned and adopted, we find just, equitable and accurate, and that the several respective quarter blocks are benefited to the extent of the respective amounts so apportioned; that after such division in quarter block districts we appraised and apportioned to the several lots and tracts of land therein, the respective amounts set opposite the description of said lots and tracts of land contained in the statement attached here-

to, marked Exhibit 'A' and made a part hereof, which respective amounts we find equitable and just according to the benefits *accruing* to said several lots and tracts of land, on the 7th day of July, 1910, we completed our duties as such Board of Appraisers and submit this our report and file same with the City Clerk of the City of Holdenville, Oklahoma, dated this 8th day of July, A. D. 1910.

(Signed) E. F. Messenger,
Chairman,
H. G. Barnard,
Secretary.
C. E. Arnold.

'Exhibit A.'

East $\frac{1}{4}$ Block of Block 68 $\frac{1}{2}$	\$1107.18
North $\frac{1}{4}$ Block of Block 68 $\frac{1}{2}$	1110.01
East $\frac{1}{4}$ Block of Block 78 $\frac{1}{2}$	307.94
East $\frac{1}{4}$ Blk. of Blk. 52 $\frac{1}{2}$	\$1047.23
North $\frac{1}{4}$ Blk. of Blk. 52 $\frac{1}{2}$	1032.08
East $\frac{1}{4}$ Blk. of Blk. 44 $\frac{1}{2}$	1023.17
North $\frac{1}{4}$ Blk. of Blk. 44 $\frac{1}{2}$	973.64
East $\frac{1}{4}$ Blk. of Blk. 33 $\frac{1}{2}$	706.48
North $\frac{1}{4}$ Blk. of Blk. 33 $\frac{1}{2}$	285.81'

A motion by Taylor, second by Nix, that the report of appraisers be received and publication of same ordered was duly carried.

Thereafter, on to-wit, July 15, 1910, at a meeting of said Mayor and Councilmen of said City of Holdenville, the following, among other proceedings, were had, as appears from the recorded minutes of said meeting:

"The Clerk submitted the following notice of meeting:

Notice of Meeting.

Notice is hereby given that the Mayor and City Council will meet on the 29th day of July, 1910, at the hour of 8 o'clock P. M., in the Council Chamber of the City Hall in the City of Holdenville, Oklahoma, for the purpose of receiving the report of the Board of Appraisers making the appraisement and apportionment on various lots, pieces of land charged with the cost of paving and otherwise improving.

That portion of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railroad right-of-

way and the right-of-way of the Rock Island Railroad at the Union Station and extending to the southeast side of Oak Street; also that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

Also that portion of Cedar Street beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street.

Also that portion of Echo Street beginning on Oklahoma Avenue and extending to the northwest side of Sixth Street.

Also that portion of Sixth Street beginning on Echo Street and extending to Oak Street.

Also that portion of Seventh Street beginning on Creek Street and extending to Oak Street.

Also that portion of Sixth Street beginning at southeast side of Oak Street and extending to the northwest side of Gulf Street, in the City of Holdenville, Oklahoma, and the report of the appraisers is hereto attached and published herewith.

At said meeting the Mayor and Council will hear and adjust any complaints and review any appraisement and apportionment made by said Board of Appraisers, as provided by law, and will review, correct, raise, or lower the same, and the Mayor and Council will adjourn from day to day and from time to time until their labors are completed.

At said meeting all persons interested may appear and be heard.

I. A. Draper, City Clerk.

Moved by Taylor, seconded by Adams, that a meeting be held on Friday, July 29th, 1910, for the purpose of reviewing the report of Board of Appraisers, and apportionment on paving district No. 1, City of Holdenville, Oklahoma. At said meeting the Mayor and Council will hear and adjust complaints, and review the appraisement and apportionment, and correct, raise, lower and review the same, and that the Clerk be directed to publish notice of same in the paper in form as by law provided. Upon vote of 'aye' and 'nay' by roll call, the following vote was recorded: Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Nix, Taylor. Those voting 'nay' none. Absent Pickens, Reese. Motion declared carried. Moved by Taylor, seconded by Adams that the Clerk give the notice of meeting by having the same published in the Holdenville Democrat.

Upon vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Cor-

nish, Hyde, Nix, Taylor. 'Those voting 'nay,' none. Absent, Pickens, Reese. Motion declared carried."

And thereafter, on, to-wit, July 29, 1910, at a meeting of said Mayor and Councilmen of said City of Holdenville, the following, among other proceedings were had, as appears from the recorded minutes of said meeting:

The Clerk read the notice of the meeting, as published in the Holdenville Democrat, being the same notice adopted and ordered published by the Council at its meeting of July 15, 1910.

The Clerk reported that no protest had been filed with him.

Councilman Pickens, came in late.

Ordinance Committee presented Resolution No. 27, which was read by the Clerk as follows:

"Resolution No. 27.

Whereas, pursuant to a resolution adopted on the 29th day of June, A. D. 1910, and notice thereafter published by the City Clerk of Holdenville, Oklahoma, as required by law, was duly held at the City Hall in the City of Holdenville, Oklahoma, on the 29th day of July, A. D. 1910, at 8 o'clock P. M. for the purpose of hearing and considering any complaint or objection concerning the appraisalment and apportionment theretofore made and returned by the Board of Appraisers for street improvement District Number One; and,

Whereas, at said session, this Board did hear and consider all complaints and objections to said appraisalment and apportionment and did then and there review, revise and correct same.

Therefore, Be It Resolved by the Mayor and Councilmen of the City of Holdenville, Oklahoma, that said appraisalment and apportionment so made and returned as aforesaid by said Board of Appraisers as aforementioned as reviewed, revised and corrected, be and the same is hereby approved, ratified and confirmed.

Adopted and approved this the 29th day of July, A. D. 1910.

Moved by Adams and seconded by Reese that Resolution No. 27 be adopted as read. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded: 'Those voting 'aye,' Adams, Hyde, Nix, Pickens, Reese, Taylor.

Those voting 'nay,' none.

Absent, Bailey, Cornish.

Motion declared carried and resolution adopted. Moved by Taylor and seconded by Adams that we adjourn. Motion declared carried."

Thereafter, on to-wit, August 23, 1910, at a meeting of said Mayor and Councilmen of said City of Holdenville, the following, among other proceedings, were had, as appears from the recorded minutes of said meeting:

"The minutes of July 20th and 29th and August 2nd were read and approved as read. The Ordinance Committee presented Ordinance No. 27, entitled 'An Ordinance to Assess the Cost of Street Improvements in Street Improvement District No. 1. Moved by Taylor, seconded by Pickens that Ordinance No. 27 be placed upon its first reading.

Upon vote of 'aye' and 'nay' by roll call the following vote was recorded: Those voting 'aye,' Adams, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent Bailey, Cornish, Nix. Motion declared carried and Ordinance No. 27 was read on its first reading. Moved by Hyde, seconded by Adams that Ordinance No. 27 be adopted as read upon its first reading. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Bailey, Cornish, Nix. Motion declared carried and Ordinance No. 27 adopted upon its first reading. Moved by Taylor, seconded by Hyde that we adjourn.

Upon vote of 'aye' and 'nay' by roll call the following vote was recorded: Those voting 'aye,' Adams, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Bailey, Cornish, Nix. Motion declared carried."

Thereafter, on, to-wit, August 25, 1910, at a meeting of the Mayor and Councilmen of said City of Holdenville, the following, among other proceedings, were had, as appears from the recorded minutes of said meeting:

"Moved by Adams, seconded by Reese that Ordinance No. 27 be placed upon its second reading by title. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded: Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay' none. Absent, Nix. Motion declared carried and Ordinance No. 27 was on its second reading by title. Moved by Hyde, seconded by Cornish that Ordinance No. 27 be adopted as read upon its second reading by title. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded: Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix. Motion declared carried and Ordinance

No. 27 adopted as read on its second reading by title. Moved by Hyde, seconded by Adams, that an emergency be declared and rules suspended for further consideration of Ordinance No. 27. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix. Motion declared carried and an emergency declared and rules suspended for further consideration of Ordinance No. 27. Moved by Hyde, seconded by Adams that Ordinance No. 27 be placed upon its third and final reading, section by section. Upon vote of 'aye' and 'nay' by roll call, the following vote was recorded, those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix. Motion declared carried and Section 1 was read. Moved by Reese, seconded by Cornish that Section 1, of Ordinance No. 27 be adopted as read on its third and final reading. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix. Motion declared carried and Section 2 was read. Moved by Adams, seconded by Hyde that Section 2 of Ordinance No. 27 be adopted as read on its third and final reading. Upon vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix.

Motion declared carried.

Moved by Hyde and seconded by Pickens that Ordinance No. 27 be adopted as a whole. Upon vote of 'aye' and 'nay' by roll call, the following vote was recorded. Those voting 'aye,' Ames, Bailey, Cornish, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Nix.

Motion declared carried and Ordinance No. 27 duly passed.

The President of the Council signed and the Clerk attested and affixed the seal of the City of Holdenville to Ordinance No. 27."

Said Ordinance No. 27 as far as the same relates to the matters and things in controversy herein being in words and figures following:

"An Ordinance to assess the cost of street improvement in Street Improvement District Number One in the City of Holdenville, Oklahoma, comprising that portion of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railroad right-of-way and the right-of-way of the Rock

Island Railroad at the Union Station and extending to the southeast side of Oak Street, also that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

"Also that portion of Cedar Street beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street. Also that portion of Creek Street beginning on Oklahoma Avenue and extending to the north side of Seventh Street. Also that portion of Echo Street beginning on Oklahoma Avenue and extending to the northwest side of Sixth Street. Also that portion of Sixth Street beginning on Echo Street and extending to Oak Street. Also that portion of Seventh Street, beginning on Creek Street and extending to Oak Street. Also that portion of Sixth Street beginning at southeast side of Oak Street and extending to the northwest side of Gulf Street.

"Whereas, the Board of Appraisers appointed by resolution adopted on the 29th day of June, A. D. 1910, to appraise and apportion the benefits to such lots and tracts of land in said Street Improvement District Number One, the same comprising:

"That portion of Oklahoma Avenue beginning at the intersection of the St. Louis and San Francisco Railroad right-of-way and the right-of-way of the Rock Island Railroad right-of-way at the Union Station and extending to the southeast side of Oak Street also that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street. Also that portion of Cedar Street beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street.

* * * * *

"Whereas, the 29th day of July, 1910, having been fixed by the Council for the hearing of any complaints or objections concerning said appraisalment and apportionment and caused due notice of such session to be published according to law and in pursuance of said action and publication such sessions was duly convened and held by the Mayor and Council on the 29th day of July, 1910, and

"Whereas, at said session the Mayor and Council did hear and consider all complaints and objections to said appraisalment and apportionment and did on said date then and there review, revise and correct the same and did by resolution confirm said appraisalment and apportionment as so revised and corrected, and,

"Whereas, all legal requirements have been fully com-

plied with to authorize the levying of said assessment against said lots and tracts of land liable to assessment therefor:

“Now, Therefore, be it ordained by the Mayor and Councilmen of the City of Holdenville, Oklahoma:

“Section 1. That a levy be and the same is hereby made a charge, assessment and tax against the following lots and tracts of land benefited in the City of Holdenville for the grading, paving, curbing, guttering and draining of Street Improvement District Number One the same comprising a portion of the streets as hereinafter set forth: That portion of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railroad right-of-way and the right-of-way of the Rock Island Railroad at the Union Station and extending to the southeast side of Oak Street:

Orig. No. of Town block	Lot or part of lot	Amount
	e 1-4 blk of blk 68 1-2	\$1107.18
	n 1-4 blk of blk 68 1-2	1110.01
	n 1-4 blk of blk 78 1-2	307.94
	east 1-4 block of block 52 1-2	1047.23
	north 1-4 block of block 52 1-2	1032.08
	east 1-4 block of block 44 1-2	1023.17
	north 1-4 block of block 44 1-2	973.64
	east 1-4 block of block 33 1-2	706.48
	north 1-4 block of block 33 1-2	285.81

“Section 2. That the assessment hereby levied against the above described lots, parts of lots and tracts of land, shall bear interest from the date of the passage of this ordinance at the rate of seven per cent. per annum, and said assessment shall be payable in ten equal annual installments. The first of said installments, with interest to that date on the whole amount, shall be payable on the first day of September, 1911, and one installment thereof with interest upon the whole amount remaining unpaid to said dates respectively, shall be payable on the first day of September of each of the years 1911 to 1920 inclusive; provided however, that the owners of any lot, lots or tracts of land or any part thereof, so assessed, shall have the privilege of paying the whole amount of their respective assessments within thirty days from the date of passage of this ordinance, without interest.

“Passed by the Council and approved by the Mayor this the 25th day of August, 1910.

(Seal)

A. C. Bailey, Pres. Council.

Attest:

I. A. Draper, City Clerk.”

Sixteenth:

Your Orators further aver that the said map referred to as having been adopted by said Mayor and Councilmen of said City of Holdenville, was never recorded; that your Orators have been unable to find the same or to learn what property the said map purports to parcel, although your Orators have made diligent efforts so to do, and your Orators aver that there has been no sufficient determination of proper quarter block districts of the unplatted property abutting upon said property, for the purpose of appraisalment and assessment, as provided in and by said Act of the Legislature of Oklahoma, approved April 17, 1909, as amended, 1909, or under the laws of said State of Oklahoma.

Your Orators further aver that they are informed and believe and upon such information and belief aver the facts to be that it is claimed by the said defendants, and each and all of them, that the said map did include into blocks and quarter blocks, all or a portion of the right-of-way and station grounds, as hereinbefore described, of your Orators at the said City of Holdenville, and that the said Blocks 33½, 44½, 52½, 68½ and 78½ are composed and made up of all or a portion of such right-of-way and station grounds of your Orators.

Seventeenth:

Your Orators further show to the court, that the premises of your Orators, as hereinabove described, are located wholly within Hughes County, in said Eastern District of Oklahoma; that your Orators are entitled, as hereinbefore alleged, to the full and free use and possession of said premises, for the purposes stated, in connection with said grants by the Congress of the United States to your Orators for a railway right-of-way and station grounds; that the reversionary interest in said premises is vested in the Government of the United States for the benefit of the Tribe of Indians; that the said estate of your Orators is not such an estate as is subject under the law to any assessment on account of said paving and street improvements, and that there is no authority of law for the assessment of the reversionary interest in said premises as alleged.

Your Orators further show to the court that by the pretended assessment of the premises described, it is sought to segregate a portion of the premises so granted to your Orators by the Congress of the United States and attach thereto a lien for the payment of such paving and street improvements; that such segregation of a portion of the premises

and consequent lien thereon, if permitted, would be contrary to and destructive of the purposes of said grant by the Congress of the United States to your Orators and that there is no authority of law therefor.

And your Orators further show to the court that there is no legal plat of any tract or tracts of land within said City of Holdenville, wherein is included any blocks designated as 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$, and that in truth and in fact no such blocks exist, and your Orators aver that the pretended assessment by said Ordinance No. 27 of said City of Holdenville of the said premises so granted to your Orators and claimed to be located within said blocks 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$, is wholly void and of no effect.

Eighteenth:

Your Orators further aver that notwithstanding the said pretended assessment against your Orators' said property, or a part thereof, or against the said Blocks 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$ is wholly void, as alleged, the said defendant, City of Holdenville, acting by and through its clerk, and purporting to proceed under the terms of said Act of the Legislature of Oklahoma, has certified to the defendant B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, a certain installment and interest thereon, of said pretended assessment against the property of your Orators or against said Blocks 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$, to be placed upon the delinquent tax list of said County and collected as other delinquent taxes are collected; that the said defendant, B. W. Mackey, as such County Treasurer of Hughes County, Oklahoma, in pursuance of his official duty, as it appears to him, threatens and is about to make a pretended sale of the premises hereinbefore described, or a portion thereof, and has advertised that he will, on November 4, 1912, make a sale of the said premises for the amount of said installments and interest thereon of said pretended assessment, and, if permitted to do so will make such pretended sale on said date, and thereby there will be cast a cloud upon the title of your Orators to the said premises; that the properties of your Orators will be scattered amongst various and different persons, purchasers at said unlawful sale and claiming title and ownership by virtue of such pretended sale and purchase, and your Orators will be compelled to resort to numerous and vexatious actions at law and suits in equity to protect its said property rights and interests, all to the irreparable damage of your Orators.

Nineteenth:

That the said defendants, Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, partners in trade doing business under and in the name of Spitzer & Company, do claim to have an interest in and to all or a portion of the warrants or bonds issued by the said City of Holdenville, under the terms of said Act of the Legislature of Oklahoma, in payment of said paving and street improvements for which said pretended assessment was laid against the property hereinbefore described, the extent of such interest being to your Orators unknown.

Twentieth:

That your Orators have paid all lawful taxes and assessments levied against them or against their property, and is and at all times has been ready and willing to pay any and all lawful taxes and assessments levied against them or their property and do now, in the event the court shall find them or either of them liable to any assessment or part thereof, offer to pay and discharge the same.

In consideration whereof, and for as much as your Orators have no sufficient remedy at law for the wrong done and threatened to be done, and that the remedy at law is inadequate to afford protection to your Orators against the trespass and wrong done, being done or threatened to be done, for the reasons hereinbefore stated, and are only relievable in a court of equity where matters of this kind are properly cognizable and reviewable.

Your Orators to the end that they may obtain the relief to which they are justly entitled in the premises do pray the court:

I.

To grant to them your writ of subpoena directed to the said B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, the City of Holdenville, a municipal corporation, and Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, partners in trade doing business under and in the name of Spitzer, Rorick & Company, requiring and commanding them, and each of them, to appear herein within the time prescribed by law and the rules of this Honorable Court, and full, true and direct answer make to the several allegations in this bill contained, but answer under oath is hereby waived.

II.

That the said defendants, and each of them, be required to set forth any and every adverse interest, claim, or demand in or to the said premises of your Orators, hereinbefore described, to the end that the same may be justly adjudicated, and declared null and void as against your Orators, and that the title and ownership of your Orators in and to the said premises and in and to the full and free use and possession thereof for the uses stated, be established and confirmed as against any and all claims of the defendants, or either or any of them, and all cloud thereon forever removed.

III.

That upon a final hearing of this cause, the said pretended assessment upon the said premises of your Orators, and the lien sought to be attached thereby, as hereinbefore alleged, be declared null and void and of no effect as against your Orators, or their said premises herein described, and that the title and ownership of your Orators in and to the said premises and in and to the full and free use and possession thereof, for the uses stated, be established and confirmed as against any and all claims arising out of said pretended assessment, and all cloud thereon forever removed.

IV.

That Your Honor grant unto your Orators your writ of injunction, enjoining and restraining the said B. W. Mackey, as Treasurer of Hughes County, Oklahoma, and personally, and all persons acting for, under or with him or in pursuance of his directions or authority or authority of his office, from making said pretended sale, or any sale of your Orators' said premises, and from taking any action to enforce the payment of said pretended assessment or any and all installments thereof and interest and penalties thereon as are prescribed for a failure to make such payment, pending the final determination of this cause by this court. And, may it please Your Honor, on a final determination of this cause, that the said injunction be made perpetual.

V.

And that your Orators may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which equity may require, and for costs.

C. O. BLAKE &

J. G. GAMBLE,

Solicitors for Complainants.

Note: The defendants and each of them are required to make full, true and direct answer to each and every of the allegations contained in the foregoing Bill of Complaint, but not under oath, answer under oath being hereby expressly waived.

C. O. BLAKE & J. G. GAMBLE,
Solicitors for Complainants.

State of Oklahoma, County of Canadian—ss.

I, J. G. Gamble, upon oath say: That I am an attorney for the complainants, The Chicago, Rock Island and Pacific Railway Company and the Choctaw, Oklahoma and Gulf Railroad Company, in the above entitled cause, and as such am authorized to make this affidavit; that there is no officer or managing agent of said complainants in Canadian County, Oklahoma, and I do make this affidavit for and on behalf of said complainants, which are foreign corporations; that I have read the above and foregoing bill of complaint and know the contents thereof; that the same is true, in all of its allegations, except such as are alleged on information and belief, and as to which I verily believe the same to be true.

J. G. Gamble.

Subscribed and sworn to before me this 31st day of October, 1912.

(Seal)

Israel G. Futoransky, Notary Public.

My Commission expires 9/6/16.

“Exhibit A.”

ARTICLES OF INCORPORATION

of the

CHOCTAW COAL AND RAILWAY COMPANY.

We, the undersigned, do hereby associate and unite together as a corporation under the provisions of title 2, chapter 34, General Statutes of Minnesota, 1878, and for that purpose do make, agree to and execute the following articles of incorporation:

Article 1.

The name of this corporation will be the Choctaw Coal and Railway Company, and its principal place of business shall be in the City of Minneapolis and State of Minnesota.

Article 2.

The general nature of the business of this corporation shall be the mining, smelting, reducing, refining, working,

shipping, selling, marketing and dealing in coal, iron and all kinds of ores and minerals; the working of stone quarries and marketing the materials and products thereof; the manufacture of coke, charcoal, pig iron, charcoal blooms and any and all kinds of iron, steel and other metals; the buying, leasing, working, selling and dealing in mineral and other mineral lands; the buying, owning, improving, leasing and selling any real or personal property, notes, bonds, mortgages or other securities necessary or convenient for the carrying out of and securing of any of the things enumerated herein; the buying, owning, improving, leasing, mortgaging and selling of any real estate upon which the corporation may have or hold any mortgage, lien, or judgment or other incumbrance, or in which the corporation may have an interest; and the building, acquiring and maintaining and operating roads, ways and railroads necessary or useful in the operation or developing of any mine or quarry owned or operated by this corporation.

Article 3.

The time of the commencement of this corporation shall be the first of December, A. D. 1887, and the period of its continuance shall be thirty years.

Article 4.

The amount of Capital Stock of this corporation shall be two million five hundred thousand dollars (\$2,500,000), divided into fifty thousand shares (50,000) of fifty dollars (\$50) each, and shall be paid in at such times and periods and in such amounts, and installments as shall hereafter be determined by the Board of Directors.

Article 5.

The highest amount of indebtedness or liability to which said corporation shall at any time be subject shall not exceed Five Hundred Thousand Dollars (\$500,000).

Article 6.

The government of this corporation and the management of its affairs shall be vested in a board of seven directors to be elected annually on the second Tuesday of January in each year, during the continuance of this corporation, whose term of office shall be one year and until their successors are elected and qualified. Immediately after the election of directors in each year they shall elect from among their number a President, Vice-President, Secretary and Treasurer, who shall hold office for one year and until their successors are elected and qualified. The offices of Secretary and Treasurer may be held by the same person. Until said election of the second Tuesday of January, A. D. 1888, George B. Kirkbride, Jacob A. Wol-

verton, John Washburn, Frank B. Lewis and Arthur M. Keath, all of Minneapolis, Minnesota, William S. Taylor, of Philadelphia, Pennsylvania, and Marcus W. Lewis, of Minneapolis, shall constitute and be the first Board of Directors, of whom George B. Kirkbride shall be President, Jacob A. Wolverton, Vice-President, and Arthur M. Keith, Secretary and Treasurer.

The names and places of residence of the persons forming this association for incorporation are as follows:

George B. Kirkbride, Jacob A. Wolverton, John Washburn and Frank B. Lewis, all of the City of Minneapolis, and State of Minnesota. In the testimony whereof, the parties hereto have hereunto subscribed their names and affixed their seals this 28th day of November, A. D. 1887, at the City of Minneapolis, State of Minnesota.

George B. Kirkbride,	(Seal)
Jacob A. Wolverton,	(Seal)
John Washburn,	(Seal)
Frank B. Lewis.	(Seal)

Signed, sealed and delivered
in presence of

E. K. Fairchild,
Chas. T. Thompson.

State of Minnesota, County of Hennepin--ss.

Be it known that on this 28th day of November, A. D. 1887, personally appeared before me, a Notary Public, in and for said County and State, George B. Kirkbride, Jacob A. Wolverton, John Washburn and Frank B. Lewis, to me personally known to be the identical persons who executed the foregoing articles of incorporation, and they each for themselves acknowledged the execution of the same as their free act and deed.

(Notarial Seal.) Edwin K. Fairchild, Notary Public,
Hennepin County, Minnesota.

Office of Register of Deeds, County of Hennepin, State of Minnesota.

I hereby certify that the within articles were filed for record in this office on the 30th day of November, A. D. 1887, at 9 o'clock A. M., and were duly recorded in Book of page

John F. Peterson, Register of Deeds.

Filed for record in this office this 30th day of November, A. D. 1887, at 11:15 o'clock A. M.

H. Mattson, Secretary of State.

CERTIFICATE OF AMENDMENT OF THE ARTICLES
OF INCORPORATION
of the
CHOCTAW COAL AND RAILWAY COMPANY.

It is hereby certified that at a meeting of the stockholders of the Choctaw Coal and Railway Company, duly and regularly called for that purpose, at which meeting all of the stockholders of said company were present and all of said stock was voted, which said meeting was held in the City of Minneapolis, Minnesota, on Tuesday, the 22d day of May, A. D. 1888, the following resolution was by the unanimous vote of the shareholders and shares of stock of said Company, adopted, to-wit:

Resolved, by the stockholders of the Choctaw Coal and Railway Company, that the following new article, altering, modifying and changing Article 4. of the Articles of Incorporation of the Choctaw Coal and Railway Company be and the same is hereby adopted and substituted for and in the place of said Article, to-wit:

Article 4.

The amount of the Capital Stock of this Corporation shall be three million seven hundred and fifty thousand dollars (\$3,750,000), divided into seventy-five thousand shares of fifty dollars (\$50.00) each, and shall be paid in at such times and periods and in such amounts and installments as shall hereafter be determined by the Board of Directors. It is further certified that at a meeting of the Board of Directors of said Corporation held at said 22d day of May, A. D. 1888, and duly and regularly called for that purpose immediately following said stockholders' meeting by the unanimous resolution of said Board of Directors the said action of said stockholders and said new articles were duly adopted, ratified and confirmed, and that by the adoption of said resolution by said stockholders and by said Board of Directors the said Articles of Incorporation of said Company were amended by increasing the amount of the capital stock of said Company from two million five hundred thousand dollars (\$2,500,00), to three million seven hundred and fifty thousand dollars (\$3,750,000).

In Witness Whereof, we the undersigned, the President and Secretary of the said The Choctaw Coal and Railway Company, hereunto set our hands this 3d day of January, A. D. 1889.

George B. Kirkbride, President,
Arthur M. Keith, Secretary.

In presence of
E. K. Fairchild,
J. N. Strong.

State of Minnesota, County of Hennepin.

George B. Kirkbride and Arthur M. Keith came before me personally and each being sworn, each for himself, says:

That the said George B. Kirkbride is the President and chief executive officer, and the said Arthur M. Keith is the Secretary of the Choctaw Coal and Railway Company, the corporation above named. That they and each of them have read the foregoing Certificate of Amendment of the Articles of Incorporation of the Choctaw Coal and Railway Company, and the same persons who have subscribed the same as President and Secretary respectively. That the said certificate is true of their own knowledge.

Edwin K. Fairchild, Notary Public,

(Notarial Seal)

Hennepin Co., Minn.

Filed in this office for record Jan'y 4th, A. D. 1889, at 10:50 o'clock A. M.

H. Mattson, Secretary of State.

CERTIFICATE OF AMENDMENT OF THE ARTICLES
OF INCORPORATION
of the
CHOCTAW COAL AND RAILWAY COMPANY.

It is hereby certified that at a meeting of the stockholders of the Choctaw Coal and Railway Company called for that purpose, at which meeting all of the stockholders of said Company were present in person or by proxy and all of said stock was voted, which said meeting was held in the City of Minneapolis, Minnesota, on Saturday, the 20th day of July, A. D. 1889, the following resolution was by the unanimous vote of the shareholders and shares of stock of said company, adopted, to-wit:

Resolved, by the stockholders of the Choctaw Coal and Railway Company, that the following new articles, changing Articles 5 and 6 of the Articles of Incorporation of the Choctaw Coal and Railway Company, be and the same are hereby adopted and substituted for and in the place of said articles, to-wit:

Article 5.

The highest amount of indebtedness or liability to which this corporation shall at any time be subject shall be ten millions of dollars.

Article 6.

The government of this corporation and the management

of its affairs shall be vested in a Board of nine Directors to be chosen annually on the second Tuesday of January in each year, during the continuance of this corporation, whose term of office shall be one year, or until their successors are elected or qualified. As soon after the election of the directors as may be, they shall choose from among their number a President and Vice-President, who shall hold office for one year or until their successors are elected or qualified. The Secretary shall be chosen by the Board of Directors to serve one year, or until their successors are elected. The offices of Secretary and Treasurer may be held by the same person."

It is further certified that at a meeting of the Board of Directors of said corporation held in the City of Philadelphia, Pennsylvania, on the 30th day of July, 1889, duly and regularly called for that purpose, the action of said stockholders in adopting said amendments was duly concurred in, ratified and confirmed; and said amendments were by said Board duly adopted, by a resolution duly passed by said Board. And it is further certified that by the adoption of said resolutions said Articles of Incorporation were amended by increasing the amount of the indebtedness or liability to which said company shall at any time be subject, from five hundred thousand dollars to ten millions of dollars; and by increasing the number of directors of said Company from seven to nine; and by permitting the Board of Directors, whose choice of Secretary and Treasurer was theretofore limited to the persons constituting said Board, to select for such officers any persons whomsoever.

In Witness Whereof, we the undersigned, the President and the Secretary of the Choctaw Coal and Railway Company hereunto set our hands and seals this 16th day of September, A. D. 1889.

Charles Hartshorne,
President. (Seal)

In presence of

D. G. Baird, (to signature of Chas. Hartshorne).
E. R. Hartshorne.

William S. Taylor,
Secretary. (Seal)

C. H. Dureer, (to signature of Wm. S. Taylor).
A. L. Howe.

State of Pennsylvania, County of Philadelphia--ss.

Charles Hartshorne came before me personally, and, being duly sworn on his oath, says that he is the President and chief executive officer of the Choctaw Coal and Railway Company, the corporation above named, that he has read the

foregoing certificate of amendment of the Articles of Incorporation of the Choctaw Coal and Railway Company, and that he is the same person who has subscribed said certificate as President, and that said certificate is true of his own knowledge.

Subscribed and sworn to before me this 16th day of September, A. D. 1889.

William C. Alderson,
Philadelphia County,
Pennsylvania.

(Notarial Seal)

State of Kansas, County of Jackson.—ss.

William S. Taylor came before me personally, and, being duly sworn on his oath, says that he is the Secretary of the Choctaw Coal and Railway Company, the corporation above named, that he has read the foregoing certificate of amendment of the Articles of Incorporation of the Choctaw Coal and Railway Company, and that he is the same person who has subscribed said certificate as Secretary, and that said certificate is true of his own knowledge.

Subscribed and sworn to before me this 18th day of September, A. D. 1889.

Robert B. Cone, Notary Public,
Jackson County, Kansas.

(Notarial Seal)

Office of Register of Deeds.

County of Hennepin, State of Minnesota. No. 96387.

I hereby certify that the within amendment was filed for record in this office on the 20th day of September, A. D. 1889, at 2-1½ o'clock P. M., and was duly recorded in Book of page

John F. Peterson, Register of Deeds.
By W. A. Plummer, Deputy.

Filed in this office for record September 20th, A. D. 1889, at 4:30 o'clock P. M.

H. Mattson, Secretary of State.

State of Minnesota.

(State Seal.)

Department of State.

I, F. P. Brown, Secretary of the State of Minnesota, do hereby certify that I have compared the annexed copy with the original Articles of Incorporation and Amendments in my office of Articles of Incorporation of 'Choctaw Coal and Railway Company' as filed in this office November 30th, 1887,

and recorded in Book 'S' of Incorporations, page 580, etc.; also Certificate of Amendment of the said Articles, as filed in this office, January 4, 1889, recorded in Book 'V' of Incorporations, page 432, etc.; and Certificate of Amendment to said Articles of Incorporation, as filed September 20th, 1889, and recorded in Book 'W' of Incorporations, page 589, etc.; and that said copy is a true and correct transcript of said original Articles of Incorporation, and also of said certificates of Amendments to said Articles and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capital, in Saint Paul, this twenty-first day of February, A. D. eighteen hundred and ninety-one.

(Seal of State)

F. P. Brown,
Secretary of State."

Endorsed: Filed Nov. 1, 1912, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 3rd day of March, A. D. 1913, the defendants B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, and The City of Holdenville, filed their Answer herein which is in words and figures as follows:

Answer of Defendants Mackey, County Treasurer, and the City of Holdenville.

The joint and several answer of B. W. Mackey as County Treasurer of Hughes County, Oklahoma, and The City of Holdenville, two of the defendants, to the bill of complaint of The Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company, plaintiffs.

These defendants, for answer to said bill of complaint, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering, say: They

Admit the corporate capacities, citizenship and residences of the plaintiffs as in the bill of complaint herein alleged, and that the defendant B. W. Mackey is the duly elected, qualified and acting treasurer of Hughes County, in the State of Oklahoma, and a resident and citizen of said Hughes County in said State and said Eastern District of Oklahoma; and that the defendant, The City of Holdenville, is a municipal corporation and city of the first class, organized and existing under the laws of the State of Oklahoma, and is located in said Hughes County, Oklahoma, in said Eastern District of Oklahoma.

Admit that this suit is an action of a civil nature; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3000.00); that the controversy herein is a controversy wholly between citizens of different States and a corporation existing under and by virtue of an Act of Congress.

Admit that on the 28th day of November, 1887, there was organized under and pursuant to the laws of the State of Minnesota, a corporation called, "Choctaw Coal & Railway Company," and which was empowered, as in plaintiffs' bill of complaint alleged.

Admit that by an Act of Congress approved on, to-wit, February 18, 1888, the said Choctaw Coal & Railway Company was empowered and authorized to construct and maintain a railway, telegraph and telephone line, and also to construct and maintain a branch line of railway through and between the points in what was then Indian Territory, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to its charter and the said Act of Congress, the said Choctaw Coal & Railway Company proceeded to develop coal mines under the leases and at the places as in plaintiffs' bill of complaint alleged, and to construct a railway line connected therewith for the transportation of the products of such mines; that in the prosecution of such work said corporation became insolvent, and that the United States Government, by an Act approved by Congress on, to-wit, August 24, 1894, empowered the purchasers of the rights of way, railroads, mines, coal leasehold estates and other property and the franchises of the said Choctaw Coal & Railway Company, at any sale made under or pursuant to any decree of court, to form a corporation empowered as in plaintiffs' bill of complaint alleged, and vested with all the rights, franchises and properties as in plaintiffs' bill of complaint alleged; and that pursuant to said last named Act of Congress there was organized the complaining corporation, The Choctaw, Oklahoma & Gulf Railroad Company; but these defendants aver that they are without knowledge that it became necessary for the United States Government to make some provision for the work undertaken by the Choctaw Coal & Railway Company to be carried on, or that it should be carried on in order that the leased mines might be operated for the benefit of the Indians as wards of the United States or for the purpose of the development of commerce in the said Territories and among the several States of the Union, and are without knowledge that, to accomplish said purposes or any

of them, or to secure the operation of said mines for the benefit of the Indians or in the interests of interstate commerce, the United States Government by said Act of Congress approved August 24, 1894, did empower the purchasers of the rights of way, railroads, mines, coal leasehold estates and other property, and the franchises of the Choctaw Coal & Railway Company as in plaintiffs' bill of complaint alleged.

Admit that the United States Government by an Act of Congress approved, to-wit, April 24, 1896, duly recognized the Choctaw, Oklahoma & Gulf Railroad Company pursuant to the Act approved August 24, 1894, and further presented the rights, powers and duties thereof, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to and in accordance with the Acts of Congress described, The Choctaw, Oklahoma & Gulf Railroad Company purchased and became possessed of and vested with all the rights, title, interest, property, possession claim and demand in law and in equity, in and to such rights of way, railroads, mines, coal leasehold estates, and with the rights, powers, immunities, privileges and franchises which had been granted to said Choctaw Coal & Railway Company, or conferred upon it, by any Act of Congress, or which it possessed by virtue of its charter under the laws of the State of Minnesota.

Admit that prior to March 24, 1904, The Choctaw, Oklahoma & Gulf Railroad Company, pursuant to and in accordance with its rights, powers, privileges and duties under and by virtue of its charter and the various Acts of Congress heretofore referred to proceeded to construct and acquire and to become possessed of and did construct and acquire and become possessed of a line of railway extending from a point on the West bank of the Mississippi River, at or near Hopefield in Crittendon County in the State of Arkansas, opposite Memphis, Tennessee, by way of Little Rock, Pulaski County, Arkansas, to a point on the boundary line between the Territory of Oklahoma and the State of Texas, at or near Texola in Greer County, Oklahoma, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to and in accordance with its rights, powers, privileges and duties, and by virtue of its charter and the various Acts of Congress, the said The Choctaw, Oklahoma & Gulf Railroad Company did locate its said railway from certain leased coal veins of the said Choctaw Coal & Railway Company to an intersection with the Atchison, Topeka & Santa Fe Railway, as provided in said Act of Con-

gress of February 18, 1888, and did file its maps, and do all things by law required to acquire a right-of-way and station grounds therefor, and that as a part of such right-of-way and station grounds the said The Choctaw, Oklahoma & Gulf Railroad Company was granted under the terms and by virtue of said Act of Congress, the following described tract of land, to-wit:

Beginning at a point three hundred two and five-tenths (302.5) feet northwesterly from the intersection of the main track of said railway company with the west line of section eighteen (18) township seven (7) north, range nine (9) east, measured along said main track; then north-easterly at right angles one hundred and fifty (150) feet; thence southeasterly at right angles parallel to and one hundred and fifty (150) feet easterly from the center of said main track; three thousand (3000) feet; thence southwesterly at right angles three hundred (300) feet; thence northwesterly at right angles, parallel to and one hundred and fifty (150) feet westerly from the center of said *mine* track, three thousand (3000) feet; thence north-easterly, at right angles one hundred and fifty (150) feet to the point of beginning, lying and being in section thirteen (13), township seven (7) north, range eight (8) east, and section eighteen (18), township seven (7) north, range nine (9) east, Hughes County, Oklahoma;

and that the said, The Choctaw, Oklahoma & Gulf Railroad Company was vested with an estate in and to the said described premises under and by virtue of said Acts of Congress, all as in plaintiffs' bill of complaint herein set forth.

Admit that on, to-wit, March 24, 1904, The Choctaw, Oklahoma & Gulf Railroad Company, being thereunto duly authorized by an Act of Congress leased to the Chicago, Rock Island & Pacific Railway Company, one of the complainants herein, all its railway lines and appurtenances thereto, including that tract of land hereinabove particularly described and located in section thirteen (13), township seven (7) north, range eight (8) east, and section eighteen (18), township seven (7) north, range nine (9) east, in Hughes County, Oklahoma, and equipment thereof, for a period of nine hundred ninety-nine (999) years; and that The Chicago, Rock Island & Pacific Railway Company, under the several Acts of Congress in the bill of complaint herein mentioned, and by virtue of its chartered rights under the laws of the States of Illinois and Iowa, under which it is incorporated, had full power, right, and authority to acquire and hold, by lease, said railway lines,

as well as to construct, acquire, hold, build and operate all the other lines which it now owns and operates within the State of Oklahoma; but these defendants say that they are without knowledge that The Chicago, Rock Island & Pacific Railway Company, under and by the terms of said lease, succeeded to all the rights, powers, facilities, franchises, properties and interests of the said The Choctaw, Oklahoma & Gulf Railroad Company in and to said railway lines, and to the full and free use and possession of said railway lines, properties and rights of way, including the premises hereinabove particularly described.

Admit that the plaintiffs have constructed and do now maintain on and upon the said rights of way and on and upon the premises hereinabove particularly described, railway tracks, both main and siding, composed of ballast, ties and steel, station houses, freight depots, and other necessary appurtenances which are in constant use in the performance of the charter powers of the plaintiffs.

Admit that the premises hereinabove particularly described or a portion thereof, are contiguous to and abut upon Oklahoma avenue, and that the same is a street or thoroughfare of the defendant, The City of Holdenville.

Admit that The City of Holdenville, under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled, "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency," approved April 17, 1908, as amended by the Act of said Legislature approved May 23, 1909, and acting by and through its Mayor and Councilmen, did on the 20th day of January, 1910, adopt a certain resolution numbered 20, declaring it necessary to grade, pave, curb, gutter and drain certain streets and avenues, or parts of streets and avenues, of the said City of Holdenville, including a part of said Oklahoma avenue, to-wit, that part of Oklahoma avenue extending approximately 1461 feet in a southeasterly direction from the point of intersection of the Frisco and Rock Island rights of way at the Union Station to the southeast side of Oak street in said city, and directing a publication thereof in a newspaper published and having a general circulation within said city, as in plaintiffs' bill of complaint alleged; and admit that thereafter such other proceedings by the Mayor and Councilmen of said City, agents, servants and appointees, took place and were had, touching the making of said improvement, and the appraisalment and

apportionment of benefits to the property liable for the cost of such improvement, and the assessment of the cost thereof against such property, as that said improvement was made, an appraisalment and apportionment of the benefits to such property had and confirmed, and an ordinance passed levying assessments in accordance with such appraisalment and apportionment as so confirmed against the several lots and tracts of land liable therefor; and that proceedings were had in that behalf as set forth in the "fourteenth" and "fifteenth" subdivisions of plaintiffs' bill of complaint herein; and

Admit farther that certain tracts of land in said appraisalment and apportionment of benefits and in said ordinance levying assessments described, to-wit, the north quarter-block of block numbered 33 & 1/2, the east quarter-block of block numbered 33 & 1/2, the north quarter-block of block numbered 44 & 1/2, the east quarter-block of block numbered 44 & 1/2, the north quarter-block of block numbered 52 & 1/2, the east quarter-block of block numbered 52 & 1/2, the east quarter-block of block numbered 68 & 1/2, the north quarter-block of block numbered 68 & 1/2, and the north quarter-block of block numbered 78 & 1/2, were so assessed in the amounts in plaintiffs' bill of complaint alleged, and that such tracts of land are and do constitute a part of the plaintiffs' right of way and station grounds, to-wit, that tract of land in plaintiffs' bill and hereinbefore particularly described.

And answering farther these defendants *deny* that there has been no sufficient determination of proper quarter block districts of that portion of plaintiffs' said station grounds fronting and abutting upon said improvement, for the purpose of appraisalment and apportionment of benefits and assessment of costs in accordance with such appraisalment and apportionment, as provided in and by said Act of the Legislature of Oklahoma approved April 17, 1908, as amended by Act approved on May 23, 1909; and although these defendants admit that a certain map referred to in the proceedings of the Mayor and Councilmen in plaintiffs' bill set forth as having been adopted by said Mayor and Council of said City of Holdenville, was never recorded otherwise than that said map itself so adopted by said Mayor and Council did constitute a part of the record of the proceedings of said Mayor and Council, by which they did include so much of said station grounds in proper quarter block districts for the purpose of appraisalment and assessment, yet they allege that such map was not subject or required to be made of record otherwise under the laws of the State of Oklahoma.

And further answering in this behalf these defendants allege that said specifically described tract of land, 300 feet in width and 3000 feet in length, extends from said point in said section 13 in a southeasterly direction, and that the larger portion thereof lies within the corporate limits of the said City of Holdenville, and constitutes the railway yards and station grounds in that city of the complainant, The Choctaw, Oklahoma & Gulf Railroad Company; that Oklahoma avenue in said city runs parallel and is contiguous to the said station grounds, along the northeasterly side thereof, the northeasterly boundary line of said tract constituting said station grounds and the southwesterly boundary line of Oklahoma avenue being identical; and that Choctaw avenue in said city runs parallel and is contiguous to said tract constituting said station grounds along the southwesterly side thereof, the southwesterly boundary line of said tract and the northeasterly boundary line of said Choctaw avenue being identical, and that the said tract of land occupies all the space between said Oklahoma avenue on the northeast side thereof in the said City of Holdenville. That so much of said Oklahoma avenue as was so improved by grading, paving, curbing, guttering and draining thereof, and to which said station grounds are contiguous as aforesaid, is approximately 1461 feet in length, and the width of said improvement extends 30 feet outward from the northeasterly boundary line of said station grounds throughout the entire 1461 feet of the length thereof; that blocks numbered respectively 34, 44, 53, 68 and 79 on the official plat of said city now on file in the office of the Register of Deeds of said Hughes County, each approximately 300 feet square, front on said Oklahoma avenue on the opposite side thereof from said station grounds; and that intervening streets, to-wit, those designated on the said official plat as Echo, Creek, Cedar and Oak, each 80 feet in width, extend in a northeasterly direction from said Oklahoma avenue, and in a southwesterly direction from said Choctaw avenue. That under and by virtue of the Acts of the Legislature of the State of Oklahoma mentioned in plaintiffs' bill of complaint herein, it is provided, among other things, that,

"if any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment."

And these defendants allege farther that such portion of plaintiffs' said right of way and station grounds as abutted upon such improvement throughout the length of 1761 feet

thereof was not platted into lots and blocks prior to the time it became necessary to the making of the appraisalment and assessment in plaintiffs' bill of complaint herein mentioned; and that the Mayor and Council of said City of Holdenville, prior to the said appraisalment and assessment and acting pursuant to said provision of the said Acts of the Legislature of the State of Oklahoma, did include in proper quarter block districts for the purpose of such appraisalment and assessment, all that part of said station grounds particularly described as follows, to-wit:

All that part of said right of way and station grounds lying as aforesaid between Oklahoma and Choctaw avenues in said city and extending from the southeasterly side of the area of intersection of the said right of way and station grounds with the right of way and station grounds of the St. Louis and San Francisco Railway Company, a distance of 1761 feet approximately, in a southeasterly direction between said avenues to the northwesterly boundary line of Gulf street in said city, as such line is extended in continuation thereof across said right of way and station grounds between said Oklahoma and Choctaw avenues;

and in that behalf did direct and cause the city engineer of said city to plat and map into proper quarter block districts such part of said station grounds; and did approve and adopt such map. That said map so adopted by said Mayor and Council did and does show the precise location of each of such quarter block districts and the precise dimensions thereof; and these defendants aver farther that so much of said right-of-way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 33 and 34 on the official plat of said city, and between the northwesterly boundary line of said Echo street as extended across said station grounds and right-of-way and the southeasterly boundary line of the area of intersection of the respective rights of way and station grounds of the St. Louis and San Francisco Railway Company and The Choctaw, Oklahoma and Gulf Railroad Company was platted and mapped and numbered as said block 33½.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 44 and 45 on the official plat of said city, and between the northwesterly boundary line of said Creek street as extended across said station grounds and right of way and the southeasterly boundary line of said Echo street as extended across

said station grounds and right of way, was platted and mapped and numbered as said block 44½.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 52 and 53 on the official plat of said city, and between the northwesterly boundary line of said Cedar street as extended across said station grounds and right of way and the southeasterly boundary line of said Creek street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 52½.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 68 and 69 on the official plat of said city, and between the northwesterly boundary line of said Oak street as extended across said station grounds and right of way and the southeasterly boundary line of said Cedar street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 68½.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 78 and 79 on the official plat of said city, and between the northwesterly boundary line of said Gulf street as extended across said station grounds and right of way and the southeasterly boundary line of said Oak street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 78½.

That each of said blocks, 33½, 44½, 52½, 68½ and 78½, is of the same size as the blocks on the northeasterly and southwesterly sides thereof, to-wit, 300 feet square, as near as may be.

That so much of said station grounds and rights of way as lies between said blocks 33½ and 44½, being of the width of said Echo street and in continuation thereof, and as lies between said blocks 44½ and 52½ being of the width of Creek street and in continuation thereof, and so much thereof as lies between said blocks 52½ and 68½ being of the width of Cedar street and in continuation thereof, and so much thereof as lies between said blocks 68½ and 78½ being of the width of said Oak street and in continuation thereof, was excluded from said quarter block districts.

That the northeast half of each of said blocks 33½, 44½, 52½, 68½ and 78½ was platted and mapped as aforesaid into quarter block districts by dividing such half into equal parts by a line extending across the same to the center of such block at right angles to the northeast boundary line thereof. That

inasmuch as said Oklahoma avenue extends in a southeasterly direction along the front of said blocks 33½, 44½, 52½, 68½ and 78½, and the exterior lines of said quarter block districts are on the two sides parallel to said Oklahoma avenue, and on the other two sides at right angles to said Oklahoma avenue, such quarter block districts were under said appraisal and apportionment and in said ordinance levying said assessment described with reference to the points of the compass, that is to say, the most northerly quarter block in each of said blocks was described as "North quarter block" and the most easterly quarter block in each of said blocks was described as the "East quarter block."

They *admit* that under and by virtue of said proceedings of the Mayor and Council of said City of Holdenville, it was sought to attach a lien to so much of plaintiffs' said tract of land as is included within said quarter block districts for the payment of the assessment levied under said ordinance against such quarter block districts for the payment of a portion of the costs of such improvement; but they *deny* that there is no legal plat, of any tracts of land within said City of Holdenville, wherein is included any blocks designated as 33½, 44½, 52½, 68½ and 78½, but on the contrary allege that a legal plat of such tracts of land does exist and that in truth and in fact such blocks do exist.

Answering further, these defendants *deny* that the reversionary interest in and to said premises hereinbefore specifically described and in part included within said quarter-block districts, shown by said map, is vested in the Government of the United States; on the contrary, these defendants allege that the reversionary interest, if any, in and to said lands is vested in the nation or tribe of Indians from which such lands were taken, and that by section 2 of said Act of Congress approved on, to-wit, February 18, 1888, and the amendment thereof approved on, to-wit, February 13, 1889, granting to the said Choctaw Coal & Railway Company the lands constituting its right of way and station grounds, it is provided that when any portion of the lands so granted shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken. That said section 2 of said Act (here set out for the convenience of the court) is in the words and figures following:

"Sec. 2. That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take

and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill: Provided, That no more than said addition of land shall be taken for any one station: Provided further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."

These defendants *deny* that the Government of the United States, or the nation or tribe of Indians from which said lands were taken, is vested with any reversionary interest in and to said lands, as against the right of the Congress to impose taxes and liens therefor upon said lands, or as against the right of the State of Oklahoma to impose taxes and liens therefor upon said lands, whether for general revenue or for the payment of assessments for local improvements; and *deny* that the estate vested in plaintiffs in and to said tract of land is such an estate as that said land is not subject under the law to any assessment on account of said paving and street improvement; and *deny* that there is no authority of law for the assessment of so much of said specifically described tract of land as was by the Mayor and Council of said City of Holdenville included in said quarter-block districts for the purpose of appraisement and assessment; on the contrary, these defendants allege that the said tract of land or so much thereof as was by the said Mayor and Council included within said quarter-block districts was and is subject to the assessment so levied against it by the Mayor and Council of the said City of Holdenville and that plaintiffs' estate in them vested as averred in plaintiffs' bill of complaint was and is subject to such assessment of said lands; and allege further that by section 5 of said Act of the Congress, approved on, to-wit, February 18, 1888, it was provided that Congress shall have the right so long as said lands are occupied and possessed by said nations and tribes of Indians, to impose such additional taxes upon said railroad as it might deem just and proper for their benefit, and that any Territory or State thereafter formed

through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. That section 5 of said Act (here set out for the convenience of the court) is in the words and figures following:

"Sec. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this act, for property taken and damages done to individual occupants by the construction of the railway; for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded: Provided, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this act dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: Provided Further, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe would be entitled to receive under the foregoing provision. Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: Provided, That Congress shall have the right, so long as said lands are occupied and possessed by said nation and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; and any Territory or State hereafter formed, through which said railway shall have been established, may exercise the like power as to such

part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act."

These defendants allege farther that such estate in and to said lands, and such right to the full and free possession and use thereof as was vested in the plaintiff The Choctaw, Oklahoma & Gulf Railway Company and its assigns, by said Acts of the Congress, were granted to and acquired by said plaintiff to be held and used in conformity with the provisions of the Acts of Congress relating to or affecting the said Choctaw Coal and Railway Company, and not otherwise, one of which provisions was and is that any Territory or State thereafter formed through which said railway shall have been established may exercise the power to impose taxes upon such part of said railway as may lie within its limits.

That section 5 of the said Act of August 24, 1894, entitled "An Act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and to confer upon the same all the powers, privileges, and franchises vested in that company," and containing the reservation hereinabove stated, is in the words and figures following:

"Sec. 5. That the said corporation, when organized as hereinbefore provided, shall have and possess perpetual succession and shall be able to sue and be sued, plead and be impleaded, in all courts of record and elsewhere, and shall have power to ordain, establish, and put in execution such by-laws and regulations as shall be proper, necessary, or convenient for the government of the said corporation, not being contrary to the Constitution and laws of the United States, and generally to do all and singular the matters and things which shall be necessary or convenient to enable the said company to maintain, use, and operate their railroads and mines which it may become possessed of by virtue hereof in conformity with the provisions of the Acts of Congress relating to or affecting the Choctaw Coal and Railway Company."

These defendants answering farther *admit* that the said defendant City of Holdenville, acting by and through its clerk, and proceeding under the terms of said Act of the Legislature of Oklahoma, has certified to the defendant B. W. Mackey as County Treasurer of Hughes County, Oklahoma, a certain installment and interest thereon of said assessment against the property of the plaintiffs, that is to say, against the said

quarter block districts in said blocks 33½, 44½, 52½, 68½ and 78½, to be placed upon the delinquent tax list of said County of Hughes and collected as other delinquent taxes are collected; and that this defendant B. W. Mackey as such County Treasurer and in pursuance of his official duty, did intend, and did advertise that he would, on November 4th, 1912, make a sale of the said quarter-blocks for the amount of said installment and interest thereon of said assessment, so levied against the same.

II.

And answering farther and for a second and separate defense to the plaintiffs' bill of complaint herein, these defendants allege that the plaintiffs ought not to be permitted to say that so much of the right of way and station grounds as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment upon any or all of the grounds or for any or all of the reasons, complaints and objections set forth in their bill of complaint herein, because these defendants allege the fact to be that such proceedings were had by the Mayor and Council of the said City of Holdenville for the making of said work of improvement, appraisalment and apportionment of benefits and costs thereof, as that the Mayor and Council of said City did upon the return of the report of the board of appraisers showing their appraisalment and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including so much of said plaintiffs' right of way and station grounds as was covered and included within said quarter block districts, appoint a time and place for holding a session to hear any complaints or objections that the said plaintiffs or others might make concerning the appraisalment and apportionment aforesaid as to any of such lots or tracts of land, and did give notice of such session and of the time and place of holding the same and did cause the city clerk to have such notice published in a newspaper published and of general circulation in said city, and which session at said time and place and for the purpose of hearing any complaint or objection concerning the appraisalment and apportionment of benefits as to any of such lots or tracts of land was duly held by the Mayor and Council of said city: and notwithstanding the plaintiffs were required to take notice of all that was done by the The City of Holdenville, the Mayor and Council, and officers of said city touching said improvement and assessment, and notwithstanding they had full knowledge of such proceedings and the making

of such improvement and that it was intended by said City Mayor and Council to assess such part of their said right of way and station grounds as did abut upon the said improvement for the payment of a portion of the cost of such improvement and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make complaint or objection concerning said appraisalment and apportionment, and did fail to make any complaint or objection to said Mayor and Council of said city at any time or place concerning said appraisalment and apportionment of benefits to so much of their said right of way and station grounds as was included by the said Mayor and Council in said quarter block districts for the purpose of such appraisalment and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said Council in relation to the making of said improvement during the progress thereof and of the making of said appraisalment and apportionment and of said assessment, and until the filing of their bill of complaint herein; and that they did not within sixty days after the passage by the Mayor and Council of said city of the ordinance in their bill of complaint herein mentioned, making such final assessment, bring any action or suit to set aside such assessment or to enjoin the levying or collecting of said assessment or contesting the validity of said assessment, upon any or all of the grounds or for any or all of the reasons, complaints or objections now in their bill of complaint herein set forth; that said ordinance making said final assessment was passed by the said City Council and approved by the Mayor thereof on the 25th day of August, 1910, and that the plaintiffs' bill of complaint herein was not filed and their action herein commenced until, to-wit, the day of, 1912. That under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved on the 17th day of April, 1908, pursuant to which Act the said improvements were made and the said assessment levied, in plaintiffs' bill of complaint complained of, it is among other things provided as in Section 7 of said Act set forth (a copy of which is here set out for the convenience of the court) in the words and figures following:

"Sec. 7. No suit shall be sustained to set aside any such assessment or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or provid-

ing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers provided for in section five, unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; provided, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment."

That by reason of the premises the said plaintiffs are forever precluded, barred and estopped from making said objection and grounds of objection and complaint in their bill of complaint herein set forth concerning said final assessment, and from contesting the validity thereof upon any ground or for any reason in their bill of complaint herein set forth.

Wherefore, these defendants ask that plaintiffs' bill may be dismissed at plaintiffs' cost.

CLARK J. TISDEL,
M. D. LIBBY,
Solicitors for defendants.

Endorsed: Filed Mar. 3, 1913, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 3rd day of March, A. D. 1913, the defendants Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, constituting the firm of Spitzer, Rorick & Company and Madison G. Baldwin filed their answer herein, which is in words and figures as follows:

Answer of Defendants H. C. Rorick, A. L. and C. B. Spitzer and M. G. Baldwin.

The joint and several answer of Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, constituting the firm of Spitzer, Rorick & Company, and Madison G. Baldwin, four of the defendants to the bill of complaint of The Choctaw, Oklahoma & Gulf Railroad Company, and The Chicago, Rock Island & Pacific Railway Company, plaintiffs.

These defendants, for answer to said bill of complaint, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering, say: They

Admit that the defendants Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer are partners in trade, doing business under and in the name of Spitzer, Rorick & Company, and do claim as such partners to have an interest in a portion of the bonds issued by the said City of Holdenville under the terms of the Act of the Legislature of Oklahoma in payment of said paving and street improvement, which assessment was levied against certain property as in plaintiffs' bill of complaint alleged, and that the defendant Madison G. Baldwin claims to have an interest in a portion of such bonds so issued by the said City of Holdenville; and these defendants *admit* that they are each and all citizens of the State of Ohio and residents of the City of Toledo in said state.

Admit the corporate capacities, citizenship and residences of the plaintiffs as in the bill of complaint herein alleged, and that the defendant B. W. Mackey is the duly elected, qualified and acting treasurer of Hughes County, in the State of Oklahoma, and a resident and citizen of said Hughes County in said State and said Eastern District of Oklahoma; and that the defendant, The City of Holdenville, is a municipal corporation and city of the first class, organized and existing under the laws of the State of Oklahoma, and is located in said Hughes County, Oklahoma, in said Eastern District of Oklahoma.

Admit that this suit is an action of a civil nature; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3000.00); that the controversy herein is a controversy wholly between citizens of different States and a corporation existing under and by virtue of an Act of Congress.

Admit that on the 28th day of November, 1887, there was organized under and pursuant to the laws of the State of Minnesota, a corporation called, "Choctaw Coal & Railway Company," and which was empowered, as in plaintiffs' bill of complaint alleged.

Admit that by an Act of Congress approved on, to-wit, February 18, 1888, the said Choctaw Coal & Railway Company was empowered and authorized to construct and maintain a railway, telegraph and telephone line, and also to construct and maintain a branch line of railway through and be-

tween the points in what was then Indian Territory, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to its charter and the said Act of Congress, the said Choctaw Coal & Railway Company proceeded to develop coal mines under the leases and at the places as in plaintiffs' bill of complaint alleged, and to construct a railway line connected therewith for the transportation of the products of such mines: that in the prosecution of such work said corporation became insolvent, and that the United States Government, by an Act approved by Congress on, to-wit, August 24, 1894, empowered the purchasers of the rights of way, railroads, mines, coal leasehold estates, and other property, and the franchises of the said Choctaw Coal & Railway Company, at any sale made under or pursuant to any decree of court, to form a corporation empowered as in plaintiffs' bill of complaint alleged, and vested with all the rights, franchises and properties as in plaintiffs' bill of complaint alleged; and that pursuant to said last named Act of Congress there was organized the complaining corporation, The Choctaw, Oklahoma & Gulf Railroad Company; but these defendants aver that they are without knowledge that it became necessary for the United States Government to make some provision for the work undertaken by the Choctaw Coal & Railway Company to be carried on, or that it should be carried on in order that the leased mines might be operated for the benefit of the Indians as wards of the United States or for the purpose of the development of commerce in the said Territories and among the several States of the Union, and are without knowledge that, to accomplish said purposes or any of them, or to secure the operation of said mines for the benefit of the Indians or in the interests of inter-state commerce, the United States Government by said Act of Congress approved August 24, 1894, did empower the purchasers of the rights of way, railroads, mines, coal leasehold estates and other property, and the franchises of the Choctaw Coal & Railway Company, as in plaintiffs' bill of complaint alleged.

Admit that the United States Government by an Act of Congress approved, to-wit, April 24, 1896, duly recognized the Choctaw, Oklahoma & Gulf Railroad Company pursuant to the Act approved August 24, 1894, and further prescribed the rights, powers and duties thereof, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to and in accordance with the Acts of Congress described, The Choctaw, Oklahoma & Gulf Railroad Company purchased and became possessed of and vested with all the rights, title, interest, property, possession,

claim and demand in law and in equity, in and to such rights of way, railroads, mines, coal leasehold estates, and with the rights, powers, immunities, privileges, and franchises which had been granted to said Choctaw Coal & Railway Company, or conferred upon it, by any Act of Congress, or which it possessed by virtue of its charter under the laws of the State of Minnesota.

Admit that prior to March 24, 1904, The Choctaw, Oklahoma & Gulf Railroad Company, pursuant to and in accordance with its rights, powers, privileges and duties under and by virtue of its charter and the various Acts of Congress heretofore referred to, proceeded to construct and acquire and to become possessed of and did construct and acquire and become possessed of a line of railway extending from a point on the west bank of the Mississippi River, at or near Hopefield in Crittendon County in the State of Arkansas, opposite Memphis, Tennessee, by way of Little Rock, Pulaski County, Arkansas, to a point on the boundary line between the Territory of Oklahoma and the State of Texas, at or near Texola in Greer County, Oklahoma, as in plaintiffs' bill of complaint alleged.

Admit that pursuant to and in accordance with its rights, powers, privileges and duties, and by virtue of its charter and the various Acts of Congress, the said The Choctaw, Oklahoma & Gulf Railroad Company did locate its said railway from certain leased coal veins of the said Choctaw Coal & Railway Company to an intersection with the Atchison, Topeka & Santa Fe Railway, as provided in said Act of Congress of February, 18, 1888, and did file its maps, and do all things by law required to acquire a right-of-way and station grounds therefor, and that as a part of such right-of-way and station grounds the said The Choctaw, Oklahoma & Gulf Railroad Company was granted under the terms and by virtue of said Act of Congress, the following described tract of land, to-wit:

Beginning at a point three hundred two and five-tenths (302.5) feet northwesterly from the intersection of the main track of said railway company with the west line of section eighteen (18) township seven (7) north, range nine (9) east, measured along said main track; thence northeasterly at right angles one hundred and fifty (150) feet; thence southeasterly at right angles parallel to and one hundred and fifty (150) feet easterly from the center of said main track; three thousand (3000) feet; thence southwesterly at right angles three hundred (300) feet; thence northwesterly at right angles, parallel to and one

hundred and fifty (150) feet westerly from the center of said *mine* track, three thousand (3000) feet; thence north-easterly, at right angles one hundred and fifty (150) feet to the point of beginning, lying and being in section thirteen (13), township seven (7) north, range eight (8) east, and section eighteen (18), township seven (7) north, range nine (9) east, Hughes County, Oklahoma;

and that the said, The Choctaw, Oklahoma & Gulf Railroad Company was vested with an estate in and to the said described premises under and by virtue of said Acts of Congress, all as in plaintiffs' bill of complaint herein set forth.

Admit that on, to-wit, March 24, 1904, The Choctaw, Oklahoma & Gulf Railroad Company, being thereunto duly authorized by an Act of Congress, leased to The Chicago, Rock Island & Pacific Railway Company, one of the complainants herein, all its railway lines and appurtenances thereto, including that tract of land hereinabove particularly described and located in section thirteen (13), township seven (7) north, range eight (8) east, and section eighteen (18), township seven (7) north, range nine (9) east, in Hughes County, Oklahoma, and equipment thereof, for a period of nine hundred ninety-nine (999) years; and that The Chicago, Rock Island & Pacific Railway Company, under the several Acts of Congress in the bill of complaint herein mentioned, and by virtue of its chartered rights under the laws of the States of Illinois and Iowa, under which it is incorporated, had full power, right, and authority to acquire and hold, by lease, said railway lines, as well as to construct, acquire, hold, build and operate all the other lines which it now owns and operates within the State of Oklahoma: but these defendants say that they are without knowledge that The Chicago, Rock Island & Pacific Railway Company, under and by the terms of said lease, succeeded to all the rights, powers, facilities, franchises, properties and interests of the said The Choctaw, Oklahoma & Gulf Railroad Company in and to said railway lines, and to the full and free use and possession of said railway lines, properties and rights of way, including the premises hereinabove particularly described.

Admit that the plaintiffs have constructed and do now maintain on and upon the said rights of way and on and upon the premises hereinabove particularly described, railway tracks, both main and siding, composed of ballast, ties and steel, station houses, freight depots, and other necessary appurtenances which are in constant use in the performance of the charter powers of the plaintiffs.

Admit that the premises hereinabove particularly described, or a portion thereof, are contiguous to and abut upon Oklahoma avenue, and that the same is a street or thoroughfare of the defendant, The City of Holdenville.

Admit that The City of Holdenville, under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled, "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency," approved April 17, 1908, as amended by the Act of said Legislature approved May 23, 1909, and acting by and through its Mayor and Councilmen, did on the 20th day of January, 1910, adopt a certain resolution numbered 20, declaring it necessary to grade, pave, curb, gutter and drain certain streets and avenues, or parts of streets and avenues, of the said City of Holdenville, including a part of said Oklahoma avenue, to-wit, that part of Oklahoma avenue extending approximately 1461 feet in a southeasterly direction from the point of intersection of the Frisco and Rock Island rights of way at the Union Station to the southeast side of Oak street in said city, and directing a publication thereof in a newspaper published and having a general circulation within said city, as in plaintiffs' bill of complaint alleged; and admit that thereafter such other proceedings by the Mayor and Councilmen of said City, agents, servants and appointees, took place and were had, touching the making of said improvement, and the appraisement and apportionment of benefits to the property liable for the cost of such improvement, and the assessment of the cost thereof against such property, as that said improvement was made, an appraisement and apportionment of the benefits to such property had and confirmed, and an ordinance passed levying assessments in accordance with such appraisement and apportionment as so confirmed against the several lots and tracts of land liable therefor; and that proceedings were had in that behalf as set forth in the "fourteenth" and "fifteenth" subdivisions of plaintiffs' bill of complaint herein; and

Admit farther that certain tracts of land in said appraisement and apportionment of benefits and in said ordinance levying assessments described, to-wit, the north quarter-block of block numbered 33 & $\frac{1}{2}$, the east quarter-block of block numbered 33 & $\frac{1}{2}$, the north quarter-block of block numbered 44 & $\frac{1}{2}$, the east quarter-block of block numbered 44 & $\frac{1}{2}$, the north quarter-block of block numbered 52 & $\frac{1}{2}$, the east quarter-block of block numbered 52 & $\frac{1}{2}$, the east quarter-block of block numbered 68 & $\frac{1}{2}$, the north quarter-block of block

numbered 68 & 1/2, and the north quarter-block of block numbered 78 & 1/2, were so assessed in the amounts in plaintiffs' bill of complaint alleged, and that such tracts of land are and do constitute a part of the plaintiffs' right of way and station grounds, to-wit, that tract of land in plaintiffs' bill and hereinbefore particularly described.

And answering farther these defendants *deny* that there has been no sufficient determination of proper quarter block districts of that portion of plaintiffs' said station grounds fronting and abutting upon said improvement, for the purpose of appraisalment and apportionment of benefits and assessment of costs in accordance with such appraisalment and apportionment, as provided in and by said Act of the Legislature of Oklahoma approved April 17, 1908, as amended by Act approved on May 23, 1909; and although these defendants admit that a certain map referred to in the proceedings of the Mayor and Councilmen in plaintiffs' bill set forth as having been adopted by said Mayor and Council of said City of Holdenville, was never recorded otherwise than that said map itself so adopted by said Mayor and Council did constitute a part of the record of the proceedings of said Mayor and Council, by which they did include so much of said station grounds in proper quarter block districts for the purpose of appraisalment and assessment, yet they allege that such map was not subject or required to be made of record otherwise under the laws of the State of Oklahoma.

And further answering in this behalf these defendants allege that said specifically described tract of land, 300 feet in width and 3000 feet in length, extends from said point in said section 13 in a southeasterly direction, and that the larger portion thereof lies within the corporate limits of the said City of Holdenville, and constitutes the railway yards and station grounds in that city of the complainant, The Choctaw, Oklahoma & Gulf Railroad Company; that Oklahoma avenue in said city runs parallel and is contiguous to the said station grounds, along the northeasterly side thereof, the northeasterly boundary line of said tract constituting said station grounds and the southwesterly boundary line of Oklahoma avenue being identical; and that Choctaw avenue in said city runs parallel and is contiguous to said tract constituting said station grounds along the southwesterly side thereof, the southwesterly boundary line of said tract and the northeasterly boundary line of said Choctaw avenue being identical, and that the said tract of land occupies all the space between said Oklahoma avenue on the northeast side thereof and Choctaw avenue on the southwest side thereof in the said City of Hold-

enville. That so much of said Oklahoma avenue as was so improved by grading, paving, curbing, guttering and draining thereof, and to which said station grounds are contiguous as aforesaid, is approximately 1461 feet in length, and the width of said improvement extends 30 feet outward from the northeasterly boundary line of said station grounds throughout the entire 1461 feet of the length thereof; that blocks numbered respectively 34, 44, 53, 68 and 79 on the official plat of said city now on file in the office of the Register of Deeds of said Hughes County, each approximately 300 feet square, front on said Oklahoma avenue on the opposite side thereof from said station grounds; and that intervening streets, to-wit, those designated on the said official plat as Echo, Creek, Cedar, and Oak, each 80 feet in width, extend in a northeasterly direction from said Oklahoma avenue, and in a southwesterly direction from said Choctaw avenue. That under and by virtue of the Acts of the Legislature of the State of Oklahoma mentioned in plaintiffs' bill of complaint herein, it is provided, among other things, that,

"if any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment."

And these defendants allege farther that such portion of plaintiffs' said right of way and station grounds as abutted upon such improvement throughout the length of 1761 feet thereof was not platted into lots and blocks prior to the time it became necessary to the making of the appraisalment and assessment in plaintiffs' bill of complaint herein mentioned; and that the Mayor and Council of said City of Holdenville, prior to the said appraisalment and assessment and acting pursuant to said provision of the said Acts of the Legislature of the State of Oklahoma, did include in proper quarter block districts for the purpose of such appraisalment and assessment, all that part of said station grounds particularly described as follows, to-wit:

All that part of said right of way and station grounds lying as aforesaid between Oklahoma and Choctaw avenues in said city and extending from the southeasterly side of the area of intersection of the said right of way and station grounds with the right of way and station grounds of the St. Louis and San Francisco Railway Company, a distance of 1761 feet approximately, in a southeasterly direction between said avenues to the northwest-

erly boundary line of Gulf street in said city, as such line is extended in continuation thereof across said right of way and station grounds between said Oklahoma and Choctaw avenues;

and in that behalf did direct and cause the city engineer of said city to plat and map into proper quarter block districts such part of said station grounds; and did approve and adopt such map. That said map so adopted by said Mayor and Council did and does show the precise location of each of such quarter block districts and the precise dimensions thereof; and these defendants aver farther that so much of said right-of-way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 33 and 34 on the official plat of said city, and between the northwesterly boundary line of said Echo street as extended across said station grounds and right-of-way and the southeasterly boundary line of the area of intersection of the respective rights of way and station grounds of the St. Louis and San Francisco Railway Company and The Choctaw, Oklahoma and Gulf Railroad Company was platted and mapped and numbered as said block 33 $\frac{1}{2}$.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 44 and 45 on the official plat of said city, and between the northwesterly boundary line of said Creek street as extended across said station grounds and right of way and the southeasterly boundary line of said Echo street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 44 $\frac{1}{2}$.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 52 and 53 on the official plat of said city, and between the northwesterly boundary line of said Cedar street as extended across said station grounds and right of way and the southeasterly boundary line of said Creek street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 52 $\frac{1}{2}$.

That so much of said right of way and station grounds as lies between the said opposite blocks, to-wit, blocks numbered 68 and 69 on the official plat of said city, and between the northwesterly boundary line of said Oak street as extended across said station grounds and right of way and the southeasterly boundary line of said Cedar street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 68 $\frac{1}{2}$.

That so much of said right of way and station grounds as lies between said opposite blocks, to-wit, blocks numbered 78 and 79 on the official plat of said city, and between the northwesterly boundary line of said Gulf street as extended across said station grounds and right of way and the southeasterly boundary line of said Oak street as extended across said station grounds and right of way, was platted and mapped and numbered as said block 78½.

That each of said blocks, 33½, 44½, 52½, 68½ and 78½, is of the same size as the blocks on the northeasterly and southwesterly sides thereof, to-wit, 300 feet square, as near as may be.

That so much of said station grounds and right of way as lies between said blocks 33½ and 44½, being of the width of said Echo street and in continuation thereof, and as lies between said blocks 44½ and 52½, being of the width of Creek street and in continuation thereof, and so much thereof as lies between said blocks 52½ and 68½, being of the width of Cedar street and in continuation thereof, and so much thereof as lies between said blocks 68½ and 78½, being of the width of said Oak street and in continuation thereof, was excluded from said quarter block districts.

That the northeast half of each of said blocks 33½, 44½, 52½, 68½ and 78½ was platted and mapped as aforesaid into quarter block districts by dividing such half into equal parts by a line extending across the same to the center of such block at right angles to the northeast boundary line thereof. That inasmuch as said Oklahoma avenue extends in a southeasterly direction along the front of said blocks 33½, 44½, 52½, 68½ and 78½, and the exterior lines of said quarter block districts are on the two sides parallel to said Oklahoma avenue, and on the other two sides at right angles to said Oklahoma avenue, such quarter block districts were under said appraisalment and apportionment and in said ordinance levying said assessment described with reference to the points of the compass, that is to say, the most northerly quarter block in each of said blocks was described as "North quarter block" and the most easterly quarter block in each of said blocks was described as the "East quarter block."

They *admit* that under and by virtue of said proceedings of the Mayor and Council of said City of Holdenville, it was sought to attach a lien to so much of plaintiffs' said tract of land as is included within said quarter block districts for the payment of the assessment levied under said ordinance against such quarter block districts for the payment of a portion of

the costs of such improvement; but they *deny* that there is no legal plat, of any tracts of land within said City of Holdenville, wherein is included any blocks designated as $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$, but on the contrary allege that a legal plat of such tracts of land does exist and that in truth and in fact such blocks do exist.

Answering further, these defendants *deny* that the reversionary interest in and to said premises hereinbefore specifically described and in part included within said quarter-block districts, shown by said map, is vested in the Government of the United States; on the contrary, these defendants allege that the reversionary interest, if any, in and to said lands is vested in the nation or tribe of Indians from which such lands were taken, and that by section 2 of said Acts of Congress approved on, to-wit, February 18, 1888, and the amendment thereof approved on, to-wit, February 13, 1889, granting to the said Choctaw Coal & Railway Company the lands constituting its right of way and station grounds, it is provided that when any portion of the lands so granted shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken. That said section 2 of said Act (here set out for the convenience of the court) is in the words and figures following:

“Sec. 2. That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; Provided, That no more than said addition of land shall be taken for any one station: Provided further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.”

These defendants *deny* that the Government of the United States, or the nation or tribe of Indians from which said lands were taken, is vested with any reversionary interest in and to said lands, as against the right of the Congress to impose taxes and liens therefor upon said lands, or as against the right of the State of Oklahoma to impose taxes and liens therefor upon said lands, whether for general revenue or for the payment of assessment for local improvements; and *deny* that the estate vested in plaintiffs in and to said tract of land is such an estate as that said land is not subject under the law to any assessment on account of said paving and street improvement; and *deny* that there is no authority of law for the assessment of so much of said specifically described tract of land as was by the Mayor and Council of said City of Holdenville included in said quarter-block districts for the purpose of appraisement and assessment; on the contrary, these defendants allege that the said tract of land or so much thereof as was by the said Mayor and Council included within said quarter-block districts was and is subject to the assessment so levied against it by the Mayor and Council of the said City of Holdenville and that plaintiffs' estate in them vested as averred in plaintiffs' bill of complaint was and is subject to such assessment of said land; and allege further that by section 5 of said Act of the Congress, approved on, to-wit, February 18, 1888, it was provided that Congress shall have the right so long as said lands are occupied and possessed by said nations and tribes of Indians, to impose such additional taxes upon said railroad as it might deem just and proper for their benefit, and that any Territory or State thereafter formed through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. That section 5 of said Act (here set out for the convenience of the court) is in the words and figures following:

"Sec. 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this act, for property taken and damages done to individual occupants by the construction of the railway; for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded: Provided, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location

as set forth in section six of this act dissent from the allowance thereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: Provided further, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe would be entitled to receive under the foregoing provision. Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: Provided, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; and any Territory or State hereafter formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits, said railway company shall have the right to survey and locate its railway immediately after the passage of this act."

These defendants allege farther that such estate in and to said lands, and such right to the full and free possession and use thereof as was vested in the plaintiff The Choctaw, Oklahoma & Gulf Railway Company and its assigns, by said Acts of the Congress, were granted to and acquired by said plaintiff to be held and used in conformity with the provisions of the Acts of Congress relating to or affecting the said Choctaw Coal and Railway Company, and not otherwise, one of which provisions was and is that any Territory or State thereafter formed through which said railway shall have been established may exercise the power to impose taxes upon such part of said railway as may lie within its limits.

That section 5 of the said Act of August 24, 1894, entitled "An Act to authorize purchasers of the property and fran-

chises of the Choctaw Coal and Railway Company to organize a corporation and to confer upon the same all the powers, privileges, and franchises vested in that company," and containing the reservation hereinabove stated, is in the words and figures following:

"Sec. 5. That the said corporation, when organized as hereinbefore provided, shall have and possess perpetual succession and shall be able to sue and be sued, plead and be impleaded, in all courts of record and elsewhere, and shall have power to ordain, establish, and put in execution such by-laws and regulations as shall be proper, necessary, or convenient for the government of the said corporation, not being contrary to the Constitution and laws of the United States, and generally to do all and singular the matters and things which shall be necessary or convenient to enable the said company to maintain, use, and operate their railroads and mines which it may become possessed of by virtue hereof in conformity with the provisions of the Acts of Congress relating to or affecting the Choctaw Coal and Railway Company."

These defendants answering farther *admit* that the said defendant City of Holdenville, acting by and through its clerk, and proceeding under the terms of said Act of the Legislature of Oklahoma, has certified to the defendant B. W. Mackey as County Treasurer of Hughes County, Oklahoma, a certain installment and interest thereon of said assessment against the property of the plaintiffs, that is to say, against the said quarter block districts in said blocks 33½, 44½, 52½, 68½, and 78½, to be placed upon the delinquent tax list of said County of Hughes, and collected as other delinquent taxes are collected; and that said defendant B. W. Mackey as such County Treasurer and in pursuance of his official duty, did intend, and did advertise that he would, on November 4, 1912, make a sale of the said quarter blocks for the amount of said installment and interest thereon of said assessment, so levied against the same.

II.

And answering farther and for a second and separate defense to the plaintiffs' bill of complaint herein, these defendants allege that the plaintiffs ought not to be permitted to say that so much of the right of way and station grounds as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment upon any or all of

the grounds or for any or all of the reasons, complaints and objections set forth in their bill of complaint herein, because these defendants allege the fact to be that such proceedings were had by the Mayor and Council of the said City of Holdenville for the making of said work of improvement, appraisalment and apportionment of benefits and costs thereof, as that the Mayor and Council of said city did upon the return of the report of the board of appraisers showing their appraisalment and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including so much of said plaintiffs' right of way and station grounds as was covered and included within said quarter block districts, appoint a time and place for holding a session to hear any complaints or objections that the said plaintiffs or others might make concerning the appraisalment and apportionment aforesaid as to any of such lots or tracts of land, and did give notice of such session and of the time and place of holding the same and did cause the city clerk to have such notice published in a newspaper published and of general circulation in said city, and which session at said time and place and for the purpose of hearing any complaint or objection concerning the appraisalment and apportionment of benefits as to any of such lots or tracts of land was duly held by the Mayor and Council of said city; and notwithstanding the plaintiffs were required to take notice of all that was done by *the* The City of Holdenville, the Mayor and Council, and officers of said city touching said improvement and assessment, and notwithstanding they had full knowledge of such proceedings and the making of such improvement and that it was intended by said City Mayor and Council to assess such part of their said right of way and station grounds as did abut upon the said improvement for the payment of a portion of the cost of such improvement and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make complaint or objection concerning said appraisalment and apportionment, and did fail to make any complaint or objection to said Mayor and Council of said city at any time or place concerning said appraisalment and apportionment of benefits to so much of their said right of way and station grounds as was included by the said Mayor and Council in said quarter block districts for the purpose of such appraisalment and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said Council in relation to the making of said improvement during the progress thereof and of the making of said appraisalment and apportionment and of said assessment, and until the filing of their bill of

complaint herein; and that they did not within sixty days after the passage by the Mayor and Council of said city of the ordinance in their bill of complaint herein mentioned, making such final assessment, bring any action or suit to set aside such assessment or to enjoin the levying or collecting of said assessment or contesting the validity of said assessment, upon any or all of the grounds or for any or all of the reasons, complaints or objections now in their bill of complaint herein set forth; that said ordinance making said final assessment was passed by the said City Council and approved by the Mayor thereof on the 25th day of August, 1910, and that the plaintiffs' bill of complaint herein was not filed and their action herein commenced until, to-wit, the . . . day of . . . , 1912. That under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved on the 17th day of April, 1908, pursuant to which Act the said improvements were made and the said assessment levied, in plaintiffs' bill of complaint complained of, it is among other things provided as in Section 7 of said Act set forth (a copy of which is here set out for the convenience of the court) in the words and figures following:

"Sec. 7. No suit shall be sustained to set aside any such assessment or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers provided for in section five, unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; provided, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment."

That by reason of the premises the said plaintiffs are forever precluded, barred and estopped from making said

objection and grounds of objection and complaint in their bill of complaint herein set forth concerning said final assessment, and from contesting the validity thereof upon any ground or for any reason in their bill of complaint herein set forth.

III.

And answering farther and for a third and separate defense to plaintiffs' bill of complaint herein, these defendants allege that the plaintiffs ought not to be permitted to say that so much of the right of way and station ground as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment and lien thereof, upon any or all of the grounds or for any and all of the reasons set forth in their bill of complaint herein, because these defendants allege the facts to be that such proceedings were had by the Mayor and Council of the said City of Holdenville for the making of said work of improvement, appraisement and apportionment of benefits and costs thereof, levying of assessments in accordance with such appraisement and apportionment upon the property therein described, including the plaintiffs' said property, for the payment of the cost of said work of improvement, as that the Mayor and Council of said city did on the 20th day of October, 1910, adopt a certain resolution, to-wit, Resolution No. 31, "providing for the issuance of street improvement bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma," in the aggregate sum of Eighty-six Thousand, Five Hundred Thirty-two and 05/100 Dollars (\$86,532.05); and that said City of Holdenville did issue such series of bonds of the tenor, denomination and number and with the interest coupons thereto attached, in accordance with and as provided in said resolution; and that for a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company aforesaid, did purchase and acquire one of said bonds with the coupons thereto attached, and ever since have been and now are the owners and holders thereof, to-wit: Bond No. 19 in the sum of One Thousand Dollars (\$1000.00) dated the 9th day of September, 1910, due and payable on the 15th day of September, A. D. 1912, with interest thereon from date thereof at the rate of six per cent per annum, evidenced by coupons Nos. 1 and 2 thereto attached, which bond with the coupons thereto attached is in the words and figures following, to-wit:

United States of America, State of Oklahoma, County of Hughes.

Number 19

1,000 Dollars

City of Holdenville

STREET IMPROVEMENT BOND

District No. 1

Know All Men by These Presents, That the City of Holdenville, in the State of Oklahoma, a City of the first class, for value received hereby acknowledges itself indebted to and promises to pay the bearer the sum of

ONE THOUSAND DOLLARS

on the 15th day of September, A. D. 1912, with interest thereon from the date hereof until the principal sum shall be due at the rate of Six per cent per annum, payable annually on the 15th day of September of each year, as evidenced by and upon the surrender of the annexed interest coupons as they severally become due: provided that if this bond shall not be paid at maturity, it shall thereafter bear interest at the rate of ten per cent per annum until paid, and both principal and interest are payable in lawful money of the United States of America at the Fiscal Agency of the State of Oklahoma, in the City of New York.

This bond is one of a series of bonds of like date and tenor issued by the City of Holdenville under authority of and in full compliance with "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved April 17, 1908, as amended, and in pursuance of resolutions and ordinances of said City duly passed, approved, recorded, authenticated and published, as required by law, for the purpose of procuring the necessary means to pay the cost and expense of improving the following named streets and parts of streets in said City: That portion of Oklahoma Avenue beginning at the intersection of the St. Louis & San Francisco Railroad right of way and the right of way of the Rock Island Railroad right of way at the Union Station and extending to the southeast side of Oak Street; that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street; that portion of Cedar Avenue beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street; that portion of Creek Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street; that portion of Echo Street be-

ginning on Oklahoma Avenue and extending to the northeast side of Sixth Street; that portion of Sixth Street beginning on Echo Street and extending to Oak Street; that portion of Seventh Street beginning on Creek Street and extending to Oak Street; that portion of Sixth Street beginning at the southeast side of Oak Street and extending to the northwest side of Gulf Street, constituting Street Improvement District No. 1 of said City and is payable solely from assessments which have been legally levied upon the lots and tracks of land benefited by said improvements, which assessments said City of Holdenville undertakes to collect, as by law provided, and the faith, credit, revenues and property of said City are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained in this bond.

And it is hereby declared and certified that all acts, conditions and things required to be done and to exist precedent to and in making said improvements and levying of said assessments and the issuing of this series of bonds have been properly done, happened and performed, and do exist, in regular and due form, time and manner as required by the Constitution and Laws of the State of Oklahoma, and that the total amount of said assessments or any installment thereof, and of the bonds issued on account of said improvements, including this bond, do not exceed any constitutional or statutory limitations.

In Witness Whereof, The City of Holdenville, by its Mayor and Council, has caused this bond to be signed by its Mayor and attested by its clerk and its corporate seal to be hereto affixed and the interest coupons hereto attached to be signed by the fac-simile signature of its Clerk, and this bond to be dated the 9th day of September, 1910.

F. P. Rutherford, Mayor.

Seal of City

Attest: I. A. Draper, City Clerk.

State of Oklahoma, County of Hughes—ss.

I, I. A. Draper, Clerk of the City of Holdenville, in the County and State aforesaid, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that said bond has been duly registered in my office.

Witness my hand and official seal this 24 day of October,
A. D. 1910. (Seal) I. A. Draper,
Clerk of the City of Holdenville.

No. 19 State of Oklahoma, County of Hughes City of Holdenville Street Improvement Bond District No. 1 1,000 Dollars Interest 6 Per Cent Dated September 9, 1910 Due September 15, 1912 Interest Payable September 15 each year Principal and interest payable at the Fiscal Agency of the State of Oklahoma in the City of New York, N. Y.

No. 2 September 15, 1912.

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk.

No. 1 September 15, 1911.

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk.

And that for a valuable consideration and before the maturity thereof the defendant Madison G. Baldwin, did purchase and acquire one of said bonds with the coupons thereto attached and ever since has been and now is the owner and holder thereof, to-wit: Bond No. 77 in the sum of One Thousand Dollars (\$1000.00) dated September 9, 1910, due and payable, on the 15th day of September, A. D. 1919, with interest thereon from the date thereof at the rate of six per cent per annum, as evidenced by nine coupons to said bond attached, which bond was of precisely the same tenor as the bond hereinabove set out, differing therefrom only in the date of maturity thereof, and in the times of payments of coupons thereto attached.

That neither of said bonds nor any part thereof, nor the interest thereon nor any part thereof, has been paid by the said City of Holdenville from assessments levied for the payment thereof, or at all, except that the interest represented by said coupons Nos. 1 and 2, has been paid.

And these defendants allege farther that they purchased and paid for said bonds in absolute and full reliance upon the said resolutions and ordinances, map and proceedings, made, passed and approved by the Mayor and Council of the said

City of Holdenville, and the record thereof in the journal of their proceedings, and that all acts, conditions and things required to be done and to exist precedent to the making of said improvement, and the making and levying of said assessment, and the issuance of said bonds, had been properly done, happened and performed, and did exist in regular and due form and manner as required by the laws of the State of Oklahoma, as so stipulated upon the face of said bonds and shown by the journal of said proceedings of the said Mayor and Council, and in good faith and absolute and full reliance upon the silence of the plaintiffs in relation to said proceedings and their acquiescence therein, and especially upon their silence and acquiescence in said ordinance levying assessments as aforesaid upon their said property included within said quarter block districts.

That notwithstanding the plaintiffs were required to take notice of all that was done by the Mayor and Council of the City of Holdenville and officers of said city touching said improvement and assessment and the including of their property in quarter block districts for the purpose of appraisalment and apportionment of the benefits of such improvement thereto, and for the purpose of assessment thereof for the payment of the cost of such improvement, and notwithstanding they had full knowledge of such proceedings and the making of such improvement and that it was intended by said Mayor and City Council to assess such part of their said right of way and station ground as did abut upon said improvement, for the payment of a portion of the cost of such improvement, and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make such complaint or objection concerning such appraisalment and apportionment, and did fail to make any complaint or objection to the Mayor and Council of said City at any time or place concerning said appraisalment and apportionment of benefits to so much of their said right of way and station grounds as was included by the said Mayor and Council in said quarter block districts for the purpose of such appraisalment and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said Mayor and Council in relation to the making of said improvement during all the progress thereof, and of the making of such appraisalment and apportionment and of said assessment, until the filing of their bill of complaint herein, and did fail and neglect to take any steps to prevent the making of said assessments upon their said property or to prevent the issuance of said bonds for the payment of the cost of said improvement, but did remain silent and acquiesce

therein, receiving the valuable and lasting benefits of said improvement to their said property, well knowing the said series of bonds, including the said bonds so purchased and now owned by these defendants, were payable solely out of the moneys to be raised by assessment against the property benefited thereby.

That these defendants purchased and paid for said bonds as aforesaid without any notice, knowledge or information that the plaintiffs had any objection to the assessment of their said property for the payment of the cost of said improvement.

That by reason of the premises the said plaintiffs are forever estopped and precluded from making said objection and objections in their bill of complaint herein set forth concerning said final assessment of their said property, and the lien of said assessment thereon, and from contesting the validity thereof, upon any of the grounds or for any of the reasons in their bill of complaint herein set forth.

Wherefore, these defendants ask that plaintiffs' bill may be dismissed at plaintiffs' cost.

CLARK J. TISDEL,

M. D. LIBBY,

Solicitors for defendants.

Endorsed: Filed March 3, 1913, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 26th day of April, A. D. 1916, the parties hereto filed Agreed Statement of Facts, which is in words and figures as follows:

Stipulation.

For the purpose of this cause it is hereby admitted, stipulated and agreed by and between the complainants and the defendants herein, that:

1. The tract of land 300 feet in width and 3,000 feet in length, specifically described in the Bill of Complaint herein, and therein alleged to constitute complainants' right-of-way and station grounds, extends in a northwesterly and southeasterly direction, and the larger portion thereof lies between Oklahoma and Choctaw Avenues, which are avenues within the corporate limits of the said City of Holdenville; and that such portion of said tract constitutes the railway right-of-

way, yards and station grounds of the complainants. Oklahoma Avenue in said city runs parallel and is contiguous to the lands constituting said right-of-way and station grounds along the northeasterly side thereof and said avenue and station grounds have a common boundary line between them. Choctaw Avenue in said city runs parallel and is contiguous to said tract constituting said station grounds along the southwesterly side thereof, and said avenue and station grounds have a common boundary line between them. The said tract of land constituting said station grounds is 300 feet in width and occupies all the space between said Oklahoma Avenue on the northeast side thereof and Choctaw Avenue on the southwest side thereof.

2. The right-of-way of the St. Louis and San Francisco Railroad Company extends in a northeasterly and southwesterly direction, and intersects the right-of-way and said station grounds of the complainants, which runs as aforesaid in a northwesterly and southeasterly direction, and so much of said Oklahoma Avenue, for the improvement of which the assessment was made of which complainants complain, and which was improved as alleged, is 1,461 feet in length, extending from the point of intersection of the northeasterly boundary line of the said station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the said St. Louis and San Francisco Railroad Company, in a southeasterly direction along the said station grounds of the complainants.

3. The surface improvement of said Oklahoma Avenue, throughout the said 1,461 feet, extends outward a distance of 30 feet from the northeasterly boundary line of said station grounds, and consists of the grading, paving, curbing, guttering and draining of the same.

4. That the said town of Holdenville was incorporated as a municipal corporation and its territory defined by legal subdivisions according to the Government survey, on the 14th day of November, 1898, and such legal subdivisions constituting the territory of the said incorporated town of Holdenville were:

“The Southeast Quarter of the Southeast Quarter of Section Twelve (12), in Township Seven (7), North of Range Eight (8), East of the Indian Meridian;

The East Half of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section Thirteen (13), in Township Seven (7) North, of Range Eight (8) East of said Meridian;

The South Half of the Southwest Quarter, and the Southwest Quarter of the Southeast Quarter of Section Seven (7), in Township Seven (7) North, of Range Nine (9) East of said Meridian;

The West Half of the Northeast Quarter, and the Northwest Quarter of the Southeast Quarter, the North Half of the Southwest Quarter, and the Northwest Quarter, of Section Eighteen (18), in Township Seven (7) North, of Range Nine (9) East of said Meridian;

constituting a tract of land one mile square, according to that Government subdivision.

That the Secretary of the Interior, under and by virtue of the terms of the original Creek agreement, caused to be surveyed, staked and platted, the said town of Holdenville, and did on the 27th day of November, 1901, approve a plat of such survey, a copy of which plat with all the endorsements thereon, is hereto attached, marked "Exhibit A" and made a part of this stipulation.

That that tract of land 300 feet in width and 3,000 feet in length and specifically described in the bill of complaint herein, and therein alleged to constitute complainants' right-of-way and station grounds, did constitute a part of the territory within the corporate limits of the said town of Holdenville as so defined on the 14th day of November, 1898, and ever since has been and is now within the corporate limits of said town, and its location relative to the blocks and streets of said town is correctly delineated and shown on said map, a copy of which, marked "Exhibit A," is hereto attached as aforesaid.

4. That in the proceedings of the Mayor and Council herein mentioned, for the improvement of certain streets and avenues in the said City of Holdenville, and the assessments of lots and blocks in said city for the payment of the cost of such improvement, the references therein contained to streets and avenues, and to lots and blocks other than those comprising said right-of-way and station grounds of the complainants, are the same streets and avenues, lots and blocks, named and numbered, and located precisely the same as shown on said map marked "Exhibit A" as aforesaid; and as to the territory covered by said map marked "Exhibit A," it did, at the time of the proceedings by the Mayor and Council herein mentioned for the improvement of certain streets and avenues in said city, and does now constitute the official map of said City of Holdenville.

5. That wagon crossings over said right-of-way and station grounds of complainants have been installed and maintained for public use for several years on the line of said Echo, Celar and Oak Streets, as shown on the map hereto attached and marked "Exhibit A;" and that on the north side of said Oak Street crossing, a concrete sidewalk has been laid across the right-of-way and station grounds for public use, and on one other of the said three street crossings, preparation by grading has been made on both sides of such crossing to put in sidewalks for public use. Said Creek Street is not open to travel across said station grounds.

6. So much of said tract of land constituting the right-of-way, station grounds and railway yards of the complainants as abuts as aforesaid on said Oklahoma Avenue throughout the said length of 1,461 feet thereof, has constructed thereon the complainants' main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all in use, and the said Echo, Creek, Cedar and Oak Streets, and Oklahoma Avenue, are the principal thoroughfares leading from the business center of said city, and from surrounding country to the said main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all of which said improvements, except "passing tracks," are located on that portion of said right-of-way and station grounds on the northeast side of the center line thereof. Very much the larger portion of the freight and passenger business done in said City of Holdenville by the complainants is derived from passenger and freight traffic conveyed to and from said station grounds and railway yards over said Oklahoma Avenue, Echo, Creek, Cedar and Oak Streets, and over the improvements on said avenue and streets, for the payment of which the assessments were levied of which complainants complain. That a copy of a plat showing the tracks and other structures and location thereof upon said station grounds and railway yards of complainants abutting on said Oklahoma Avenue, is hereto attached, marked "Exhibit B," and made a part of this stipulation.

7. That the elevator, storage houses, oil warehouse and coal bins shown by said plat rest upon sites used under permits by complainants to persons and companies for use in handling commodities transported over the complainants' lines, and said persons and companies so using said sites also transact thereon a local business in such commodities with

others than the complainants; that said permits are subject to termination on thirty days' notice by either party. And one of complainants' railway tracks on said station grounds and railway yards is constructed along the northeast side of such grounds and yards and in such proximity to that part of Oklahoma Avenue improved as herein shown for the distance of 800 feet in length, as that the one side of the freight car, or cars, standing on any part of such track throughout the said 800 feet, is flush with the edge of said avenue and improvement, so that in loading complainants' freight cars with certain freights for transportation, and in unloading certain freights therefrom, wagons delivering and receiving such freights stand upon the improved portion of such avenue while unloading therefrom into said cars and while loading such wagons out of such cars, and have made such use of said avenue and improvement ever since said improvements were made.

8. Under and by virtue of the Act of the Legislature of the State of Oklahoma, mentioned in complainants' bill of complaint herein, it is provided, among other things, that,

"If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block district for the purpose of appraisalment and assessment, as herein provided."

9. That portion of complainants' right-of-way, railway yards and station grounds abutting as aforesaid on said Oklahoma Avenue throughout the length thereof, from the point of intersection of the northeasterly boundary line of said right-of-way and station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the St. Louis and San Francisco Railroad Company, and lying between said Oklahoma and Choctaw Avenues, had not been platted into lots and blocks, and the Mayor and Council of said City of Holdenville on June 29, 1910, by motion, adopted a map, a copy of which is hereto attached, marked "Exhibit C." That the minutes of said City Council with reference to said map are as follows:

"City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

Upon a vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Cornish, Nix.

Motion declared carried and map adopted."

That on the original of said map the lines, showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered 33 $\frac{1}{2}$ %, 44 $\frac{1}{2}$ %, 52 $\frac{1}{2}$ %, 68 $\frac{1}{2}$ %, 78 $\frac{1}{2}$ %, and the dollar signs followed by figures appearing therein, are in pencil, and attached thereto are certain affidavits and endorsements, copies of which are attached to said exhibit; that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the City of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of subdividing said right-of-way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements.

10. Inasmuch as said Oklahoma Avenue extends in a southeasterly and northwesterly direction along the front of said blocks 33 $\frac{1}{2}$ %, 44 $\frac{1}{2}$ %, 52 $\frac{1}{2}$ %, 68 $\frac{1}{2}$ % and 78 $\frac{1}{2}$ %, and the exterior lines of said quarter-block districts as shown by said map are on two of the opposite sides thereof parallel to said Oklahoma Avenue, and on the other two opposite sides thereof are at right angles to said Oklahoma Avenue, such quarter-block districts were, under said appraisalment and apportionment, and in the said ordinance levying said assessments, described with reference to the cardinal points of the compass, that is to say, the most northerly quarter-block of each of said blocks was given the designation of "North $\frac{1}{4}$ Block of Block" (the number being inserted), and the most easterly quarter-block of each of said blocks was given the designation of "East $\frac{1}{4}$ Block of Block" (the number being inserted).

11. On June 1, 1910, an agent of complainants interviewed the City Clerk of Holdenville, one Draper, and on said date examined the records of the proceedings of said Council respecting the improvement of Oklahoma Avenue in said city; that said proceedings disclosed no plat or record thereof dividing complainants' said property into lots and blocks for any purpose, nor any appraisalment nor assessment thereof.

12. After said map marked "Exhibit C" herein had been approved and adopted by the City Council of the City of Holdenville, as hereinbefore set forth, and the said ordinance had been passed, levying the assessments of which the complainants complain, the said original map was included in a transcript of the proceedings of the Mayor and Council of said City of Holdenville touching the work of improvements of said Oklahoma Avenue and other streets, and delivered to the contractor performing the work and by him forwarded to Spitzer, Rorick & Company of Toledo, Ohio, they being the purchasers of the bonds issued by the City to procure the funds to construct said improvements, and who, upon discovering that said map so held by them was the original map, between January 23, 1913, and March 7, 1913, returned the said map to the City Clerk with the affidavits and endorsement of McIntosh Barber Company attached thereto as shown by said Exhibit C. hereto.

13. After the said return of said map to the City Clerk of said City, which return took place after the commencement of this action, the Mayor and Council of said City did adopt a resolution, a copy of which is hereto attached, marked "Exhibit D."

14. That there is no plat or record except the plat, a copy of which is attached hereto as "Exhibit C." and the record of the proceedings of the Mayor and Council adopting such plat, as aforesaid, which shows any subdivision of complainants' said property into blocks numbered 33½, 44½, 52½, 68½ and 78½.

15. Such proceedings were had by the Mayor and Council of the City of Holdenville, touching the making of said work of improvement upon Oklahoma avenue in said City, the cost thereof, the appraisalment and apportionment of benefits conferred upon abutting property, as that the Mayor and Council of said City did, upon the return of the report of the Board of Appraisers showing the appraisalment and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including said "North ¼ block of Block 78½, East ¼ block of Block 68½, North ¼ block of Block 68½, East ¼ block of Block 52½, North ¼ block of Block 52½, East ¼ block of Block 44½, North ¼ block of Block 44½, East ¼ block of Block 33½, North ¼ block of Block 33½," appoint a time and place for holding a session to hear any complaints or objections that the said complainants or others might make concerning the said appraisalment

and apportionment aforesaid as to any such lots and tracts of land, and did give due notice of such session and of the time and place of holding the same, by causing the City Clerk of such City to have such notice published in a newspaper published and of general circulation in said City, and the Mayor and Council of said City did duly hold such session at the time and place so appointed and noticed, and did there and then, to-wit, on the 29th day of July, 1910, by resolution, confirm said report of such appraisement and apportionment as revised and corrected by them.

16. The complainants and each of them did fail to appear at such session to make complaint or objection against such appraisement and apportionment, and did fail and neglect to make complaint or objection to said Mayor and Council at any time against such appraisement and apportionment of benefits to so much of their said tract of land constituting their said right-of-way and station grounds as was included as aforesaid in said quarter-block districts.

17. Complainants did not, nor did either of them, within sixty days after the passage by the Mayor and Council of said City of Holdenville of the ordinance in their bill of complaint herein mentioned, making the assessments of which they complain, a copy of which insofar as the assessments involved in this action are concerned is as alleged in the bill of complaint herein, bring any action or suit to set aside such assessment or to enjoin the levying or collecting of such assessment, or contesting the validity thereof upon any or all of the grounds or for any or all of the reasons, complaints or objections now in their bill of complaint herein set forth. Said ordinance making said final assessment was passed by the said City Council and approved by the Mayor thereof on the 25th day of August, 1910, and published on the third day of September, 1910, and the complainants' bill of complaint herein was not filed and their action herein commenced until, to-wit, the 1st day of November, 1912.

18. The complainants had full knowledge of the commencement, and of the progress and completion of said work of improvement of and along said Oklahoma Avenue.

19. The Mayor and Council of the City of Holdenville did on the 20th day of October, 1910, adopt a certain resolution, to-wit:

“Resolution No. 31.

Providing for the issuance of street improvement

bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma,"

in the aggregate amount of Eighty-six thousand, five hundred thirty-two and 05/100 dollars (\$86,532.05); and did issue such series of bonds of the tenor, denomination and numbers and with the interest coupons hereto attached, in accordance with and as provided in said resolution, except that Bond No. 29 for \$650.00 and Bond No. 55 for \$1,000.00 and Bond No. 56 for \$650.00 and Bond No. 65 for \$650.00, were not issued but cancelled, a copy of which resolution is hereto attached, marked "Exhibit E," and made a part of this stipulation.

20. For a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, did purchase and acquire all said series of bonds so issued, and were at the commencement of this action the owners and holders and are now the owners and holders of one of said series of bonds with the coupons thereto attached, to-wit, bond No. 19 in the sum of \$1,000.00 dated the 9th day of September, 1910, due and payable on the 15th day of September, 1912, with interest from date thereof at the rate of six per cent. per annum, evidenced by coupons numbered 1 and 2 thereto attached.

21. For a valuable consideration and before maturity thereof the defendant, Madison G. Baldwin, did purchase and acquire and is now the owner and holder of one of said series of bonds with the coupons thereto attached, to-wit, bond No. 77 in the sum of \$1,000.00, dated September 9, 1910, due and payable on the 15th day of September, 1919, with interest from date thereof at the rate of six per cent. per annum, evidenced by nine coupons numbered 1 to 9 both inclusive to said bond attached.

22. Neither of said bonds numbered respectively 19 and 77, nor any part of the principal thereof, or the interest thereon or any part thereof, has been paid, except that the interest represented by said coupons numbered 1 and 2 on each of said bonds has been paid.

23. The defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, and Madison G. Baldwin, purchased and paid for said bonds numbered 19 and 77 in reliance upon the resolution, orders, ordinances, maps and proceedings, made, passed and approved by the Mayor and Council of the said City of Holdenville,

and the record thereof as the same appears upon the record of their proceedings, and they relied upon the recitals appearing on the face of said bonds.

24. That on the 16th day of September, 1912, the City Clerk of said City of Holdenville made a certificate to the County Treasurer of Hughes County, Oklahoma, a copy of which in so far as the assessment involved in this action is concerned, is hereto attached and marked "Exhibit F" and made a part hereof. And thereafter the said County Treasurer placed said described property on the delinquent tax list for the current year and advertised the same for sale in the amount of said installment of said assessment as shown by said certificate and penalties provided by law; that the description of the property involved in this action was in said advertisement the same as that shown by said certificate of said City Clerk.

25. That on March 24, 1904, the said Choctaw, Oklahoma & Gulf Railroad Company leased to The Chicago, Rock Island & Pacific Railway Company all its railway lines and appurtenances thereto, including the premises particularly described in the bill of complaint herein, a copy of which said lease is hereto attached, marked "Exhibit G" and made a part hereof.

26. That a certain exhibit marked "A," attached to and made a part of the report of the appraisers mentioned in the bill of complaint, shows the description of each lot, piece or parcel of land and the amount appraised and apportioned against each such lot, piece or parcel of land, and all that portion of such exhibit "A" which gives a list of the lots, pieces and parcels of land fronting or abutting upon said Oklahoma Avenue and the amount of the appraisal and apportionment opposite such lot, piece or parcel of land as confirmed by the Mayor and Council is in the words and figures of the exhibit hereto attached, marked "Exhibit H," and made a part of this stipulation, and is a true and correct statement of so much of said report.

27. That section 1 of the assessing ordinance mentioned in the pleadings herein, omitting all those lots, pieces and parcels of land not fronting or abutting upon said Oklahoma Avenue and the amounts of the assessments against the same, is in the words and figures shown by "Exhibit I" hereto attached and made a part of this stipulation.

28. That the said right-of-way and station grounds, hereinafter particularly described, are a part of the lands granted by the Congress of the United States for the purposes and as alleged in the bill of complaint herein and together with the said tracks and facilities located thereon, were at the time of the proceedings by said City Council and for a long time theretofore and ever since have been used as a part of said railway in the conduct of business as a common carrier of both interstate and intrastate commerce, and that a portion of the main track of said railway is upon the property sought to be subjected to the payment of assessments involved in this action.

29. It is agreed that this cause be submitted upon the bill, answers and this stipulation of fact, and such other competent, relevant and material evidence as the parties, or either of them, shall offer not inconsistent therewith.

C. O. BLAKE,

.....

Attorneys for Complainants.

.....

J. B. FERRY & E. C. MOTTER,

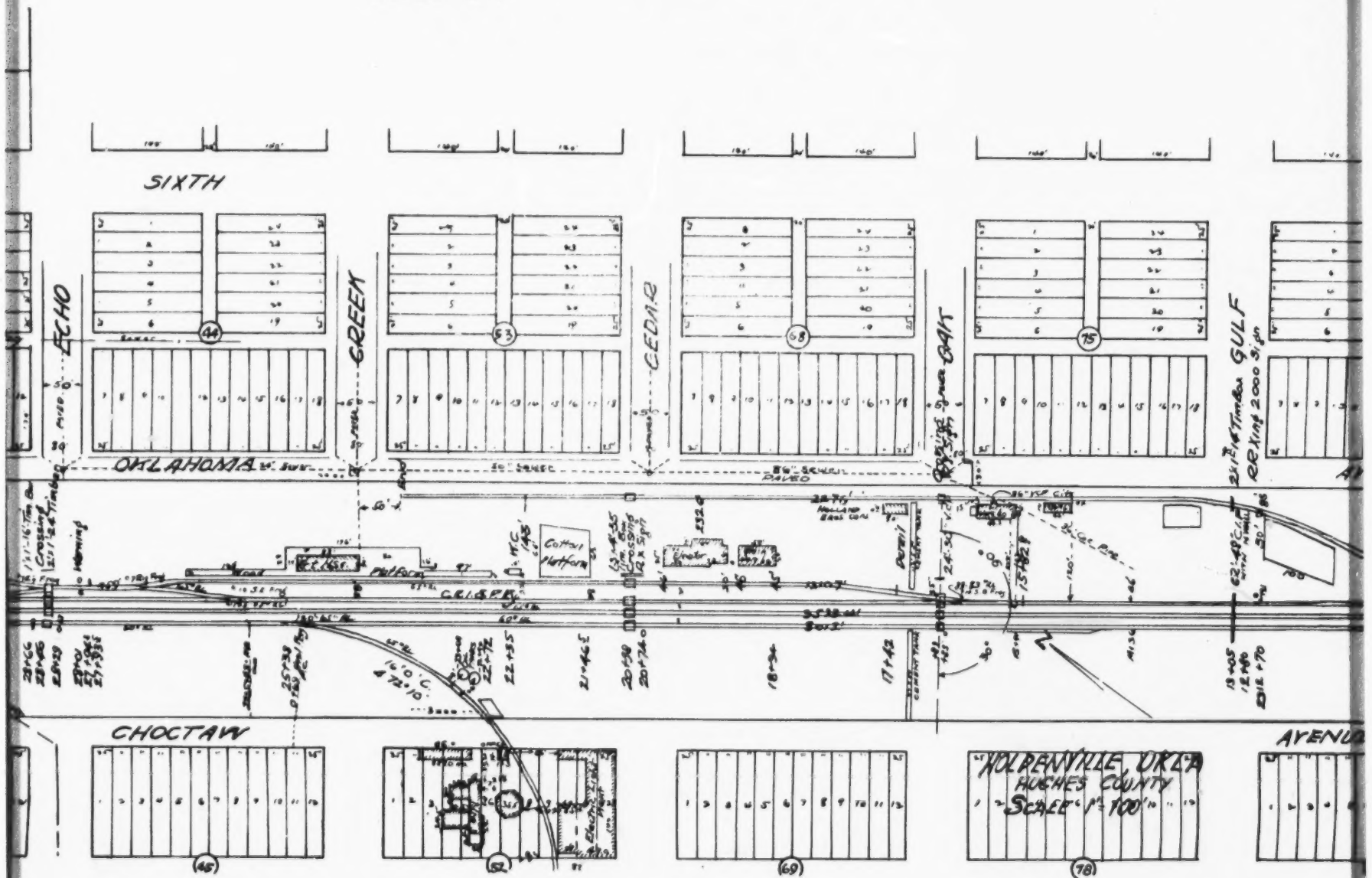
Attorneys for Defendants.

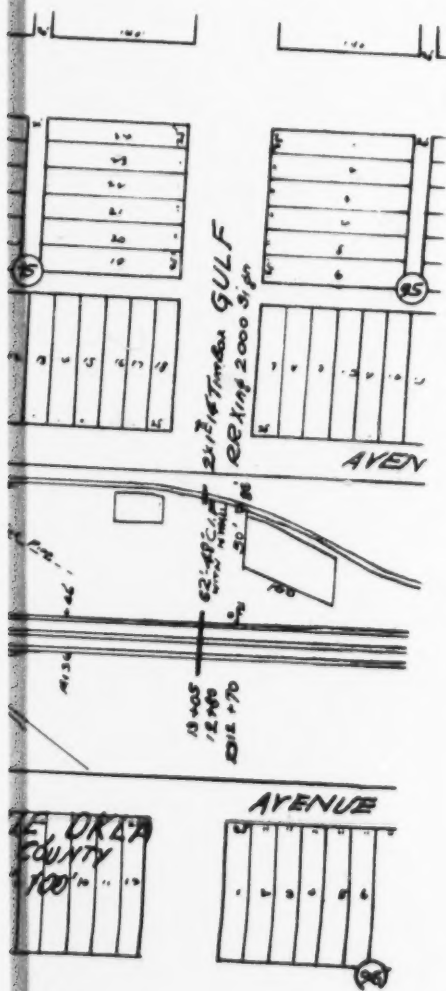
EXHIBIT A.—Plat of the Town of Holdenville, approved by the Secretary of the Interior November 27, 1901 [omitted from this record by agreement of counsel set forth in subdivision 4 of the "Praecipe and Election as to Printing Record," *infra*].

EXHIBIT B.—Copy of a plat showing the tracks and other structures and location thereof upon said station grounds and railway yards of complainants abutting on Oklahoma Avenue [reproduced and inserted between pages 78 and 79 of Record].

EXHIBIT C.—Map showing certain lands lying between Oklahoma and Choctaw Avenues, not platted into lots and blocks, adopted by the Mayor and Council of Holdenville, June 29, 1910 [reproduced and inserted between pages 78 and 79 of Record].

Exhibit "B".





PLAT OF PAVING DIST. No. 1.

Adopted June 29, 1910, and filed now for then by
of City Council, Mch. 7, 1913.

J. D. _____
City

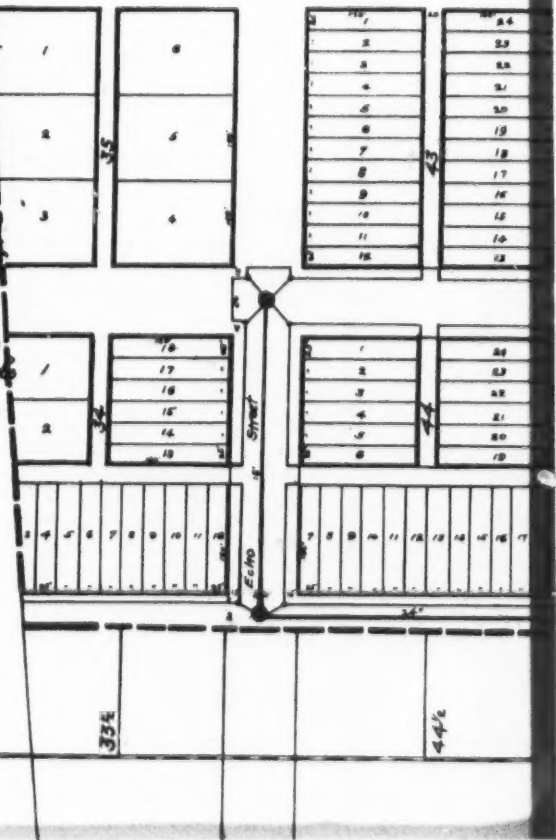
Exhibit "C"
MAP
Paving District #1
Holdenville,
Okla.

Scale 1/4" = 100'

1	24
2	25
3	26
4	27
5	28
6	29
7	30
8	31
9	32
10	33
11	34
12	35

*My hereby certify that
this plat is the original
plat of paving district
No. 1 in the City of Holdenville,
Okla. as prepared by me
showing the property of
the Chicago, Rock Island
and Pacific Railway
Company in said city
divided into quarter
blocks for the purpose
of assessing the benefits
to such property resulting
from said improvements
which plat was adopted
by Council of the City of
Holdenville, June 29, 1910.*

*Franklin B. Baskin
City Engineer*



[illegible]

"Exhibit D."

RESOLUTION.

Whereas, at a meeting of the Mayor and Council of the City of Holdenville, Oklahoma, held on the 19th day of June, 1910, as shown by the Clerk's record of the minutes of said City, the said Mayor and Council did adopt a certain map for the purpose of including in proper quarter block districts for the purpose of appraisalment and apportionment of benefits and assessments, a part of the right-of-way and station grounds of The Chicago, Rock Island & Pacific Railway Company within the corporate limits of said City and fronting upon Oklahoma Avenue in Paving District No. 1 therein, and which map did show that portion of said right-of-way and station grounds lying between said Oklahoma Avenue and Choctaw Avenue and extending in a southeasterly direction, the area of intersection of said right-of-way and station grounds with the right-of-way of the St. Louis and San Francisco Railroad Company, to the northwest line of Gulf Street in said City as extended across said right-of-way and station grounds of the said The Chicago, Rock Island & Pacific Railway Company, platted and mapped as blocks 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$, excluding so much of said right-of-way and station grounds from said blocks as falls within the boundary lines as extended across said right-of-way and station grounds of certain streets in said city, to-wit, Echo Street, Creek Street, Cedar Street and Oak Street; and,

Whereas, said map was thereafter inadvertently included in a transcript of the proceedings of the Mayor and Council of said city touching the making of the improvement in said Paving District No. 1, and forwarded to Messrs. Spitzer, Rorick & Co. of Toledo, Ohio, they being the persons who were furnishing the funds to the contractor to construct said improvement, and who have since returned the said map to the City Clerk of said city with affidavits of identification attached thereto.

Now, Therefore, the City Clerk of said city is hereby directed and ordered to endorse upon said map so adopted, and over his signature as such clerk, the words,

"Adopted by the Mayor and Council on the 29th day of June, 1910, and filed now for then on this 7th day of March, 1913,"

and that he procure at the expense of the city a suitable mapping device to be marked and known as the "Map Record," in which shall be filed and securely fastened all official maps

made under authority of the city, and to file therein the said map so adopted on the said 29th day of June, 1910.

And it is further ordered that the City Clerk make upon the margin of the Journal where this order is entered, a proper cross-reference to the page of the Journal where are entered the minutes of said meeting of June 29th, 1910, adopting said plat, and on the margin of the page of the journal where are entered said minutes of the meeting of June 29th, 1910, a proper cross-reference to the page of the Journal on which this order is to be found, and a farther cross-reference on the margin of the Journal of the minutes of June 29th, 1910, adopting said plat, to the "Map Record" where said map so adopted will be found.

"Exhibit E."

RESOLUTION NO. 31.

Providing for the Issuance of Street Improvement Bonds to Pay the Cost of Paving and Otherwise Improving Streets in Street Improvement District No. 1, of the City of Holdenville, Oklahoma.

Whereas, in pursuance of proceedings duly had and taken according to law, a contract has been let by the Mayor and Council of the City of Holdenville, Oklahoma, for the improvement of the following named streets and parts of streets in said City, to-wit:

That portion of Oklahoma Avenue beginning at the intersection of the St. Louis and San Francisco Railroad right-of-way and the right-of-way of the Rock Island Railroad right-of-way at the Union Station and extending to the southeast side of Oak Street.

That portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

That portion of *Sedar* Street beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street.

That portion of Creek Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street.

The portion of Echo Street beginning on Oklahoma Avenue and extending to the northeast side of Sixth Street.

That portion of Sixth Street beginning on Echo Street and extending to Oak Street.

That portion of Seventh Street beginning on Creek Street and extending to Oak Street.

That portion of Sixth Street beginning at the southeast

side of Oak Street and extending to the northwest side of Gulf Street, constituting Street Improvement District No. 1 of said City, by grading, paving, curbing and draining the same, and

Whereas, the cost of said improvements has been ascertained and the amount thereof has been duly apportioned to and assessed against the several lots and tracts of land liable to be so assessed for said improvements as by law provided; and

Whereas, the amount of such assessments remaining unpaid is ascertained and is hereby determined to be the sum of \$86,532.05, and

Whereas, all legal requirements have been complied with to authorize the issuance of street improvement bonds to pay the cost of said improvements,

Now, Therefore, Be It Resolved by the Mayor and Councilmen of the City of Holdenville, Oklahoma:

Section 1. That, for the purpose of paying the cost of said improvements, there shall be issued a series of Street Improvement Bonds in said amount which shall consist of 80 bonds of \$1,000.00 each, ten bonds of \$650.00 each, and one bond of \$32.05 which shall bear date of September 9, 1910, shall bear interest at the rate of six per cent per annum, payable annually until due and if not paid when due shall bear interest thereafter at the rate of ten per cent per annum until paid, shall be numbered from No. 1 to No. 91, and both principal and interest shall be payable at the Fiscal Agency of the State of Oklahoma in the City of New York.

Section 2. That said series of bonds shall become due and payable as follows:

Nos. 1 to 10,	amount \$8,682.05,	due September 15, 1911
Nos. 11 to 19,	amount \$8,650.00,	due September 15, 1912
Nos. 20 to 28,	amount \$8,650.00,	due September 15, 1913
Nos. 29 to 37,	amount \$8,650.00,	due September 15, 1914
Nos. 38 to 46,	amount \$8,650.00,	due September 15, 1915
Nos. 47 to 55,	amount \$8,650.00,	due September 15, 1916
Nos. 56 to 64,	amount \$8,650.00,	due September 15, 1917
Nos. 65 to 73,	amount \$8,650.00,	due September 15, 1918
Nos. 74 to 82,	amount \$8,650.00,	due September 15, 1919
Nos. 83 to 91,	amount \$8,650.00,	due September 15, 1920

Section 3. That said bonds and coupons shall be executed in the form and shall contain recitals substantially as follows:

United States of America, State of Oklahoma, City of Holdenville.

No.

\$.....

STREET IMPROVEMENT BOND.

Know All Men by These Presents, that the City of Holdenville, in the State of Oklahoma, a city of the first class, for value received hereby acknowledges itself indebted to and promises to pay the bearer the sum of Dollars on the 15th day of September, A. D. 19...., with interest thereon from the date hereof until the principal sum shall be due at the rate of six per cent per annum, payable annually on the 15th day of September of each year, as evidenced by and upon the surrender of the annexed interest coupons as they severally become due; provided that if this bond shall not be paid at maturity, it shall thereafter bear interest at the rate of ten per cent per annum until paid, and both principal and interest are payable in lawful money of the United States of America at the Fiscal Agency of the State of Oklahoma, in the City of New York.

This bond is one of a series of like date and tenor issued by the City of Holdenville under authority of and in full compliance with "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency," approved April 17, 1908, as amended, and in pursuance of resolutions and ordinances of said City duly passed, approved, recorded, authenticated and published, as required by law, for the purpose of procuring the necessary means to pay the cost and expense of improving the following named streets and parts of streets in said city: That portion of Oklahoma Avenue beginning at the intersection of the St. Louis and San Francisco Railroad right of way and the right of way of the Rock Island Railroad right of way at the Union Station and extending to the southeast side of Oak Street; that portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street; that portion of Cedar Avenue beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street; that portion of Creek Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street; that portion of Echo Street beginning on Oklahoma Avenue and extending to the northeast side of Sixth Street; that portion of Sixth Street beginning on Echo Street and extending to Oak Street; that portion of Seventh Street beginning on Creek Street and extending to Oak Street; that portion of Sixth Street beginning at the

southeast side of Oak Street and extending to the northwest side of Gulf Street, constituting Street Improvement District No. 1 of said City, and is payable solely from assessments which have been legally levied upon the lots and tracts of land benefited by said improvements, which assessments said City of Holdenville undertakes to collect, as by law provided, and the faith, credit, revenues and property of said City are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained in this bond.

And it is hereby declared and certified that all acts, conditions and things required to be done and to exist precedent to and in making said improvements and the levying of said assessments and the issuing of this series of bonds have been properly done, happened and performed, and do exist, in regular and due form, time and manner as required by the Constitution and Laws of the State of Oklahoma, and that the total amount of said assessments or any installment thereof, and of the bonds issued on account of said improvements, including this bond, do not exceed any constitutional or statutory limitations.

In Witness Whereof, the City of Holdenville by its Mayor and Council has caused this bond to be signed by its Mayor and attested by its Clerk and its corporate seal to be hereto affixed and the interest coupons hereto attached to be signed by the lithographed signature of its clerk, and this bond to be dated the ninth day of September, 1910.

....., Mayor.

Attest: City Clerk.

Interest Coupon.

No. \$.....

On the 15th day of September, 19.., the City of Holdenville, State of Oklahoma, will pay the bearer Dollars at the Fiscal Agency of the State of Oklahoma in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910, No.

....., City Clerk.

Section 4. That said bonds shall be signed by the Mayor and attested by the Clerk of said City and shall have the corporate seal of said City affixed, and that the interest coupons thereto attached shall be signed by the City Clerk, provided that the signature of the Clerk may be lithographed on said coupons, and that the Mayor and Clerk be and they hereby are authorized to prepare and execute said bonds and coupons

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and when so executed and registered by the City Clerk with certificates of such registration endorsed thereon said bonds shall be disposed of as shall be hereafter ordered by this Board.

Adopted Oct. 20, 1910.

Approved Oct. 20, 1910.

(Seal)

F. R. Rutherford,

Mayor.

Attest: I. A. Draper, City Clerk.

Exhibit "F".

CERTIFICATE OF DELINQUENT PAVING TAX.

State of Oklahoma, County of Hughes—ss.

In the Matter of the Delinquent Assessment Provided for and Levied Against the Property and the Owners Thereof Situated in Street Improvement District Number One (1) of the City of Holdenville, Hughes County, Oklahoma.

To the County Treasurer of Hughes County, State of Oklahoma.

I, J. D. Watts, City Clerk of the City of Holdenville, Hughes County, Oklahoma, in accordance with the provisions of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the Improvement of Streets and other public places within cities of the First Class, by paving, etc.; approved April 17, 1908," and by the further provision under said Act provided for by Ordinance number twenty-seven (27) duly enacted, passed and approved, published by the Mayor and Council of the City of Holdenville aforesaid on the 3rd day of September, 1910, entitled "An Ordinance to assess the cost of Street Improvement District Number One (1) in the City of Holdenville, Okla., etc., Do Hereby certify that I, as City Clerk aforesaid, have given notices advising the owners of the property of affected by the assessment made under said law and ordinance in said District and City, of the date of the payment of the installment due and payable thereon on the 1st day of September, 1912, and that of said assessment and interest due on said 1st day of September, 1912, made and levied against the property in said District, there remains due and unpaid against the following described property in said District, the amount set opposite each item thereof, and that in addition thereto a penalty of 18%.

Description of Lot	Block	Amount Due
East $\frac{1}{4}$ of Block.....	68 $\frac{1}{2}$	\$180.47
North $\frac{1}{4}$ of Block.....	68 $\frac{1}{2}$	180.94
North $\frac{1}{4}$ of Block.....	78 $\frac{1}{2}$	50.19
East $\frac{1}{4}$ block of.....	52 $\frac{1}{2}$	170.70
North $\frac{1}{4}$ block of.....	52 $\frac{1}{2}$	168.24
East $\frac{1}{4}$ block of.....	44 $\frac{1}{2}$	166.78
North $\frac{1}{4}$ block of.....	44 $\frac{1}{2}$	158.70
East $\frac{1}{4}$ block of.....	33 $\frac{1}{2}$	115.16
North $\frac{1}{4}$ block of.....	33 $\frac{1}{2}$	46.58

And that you are directed as Treasurer of said County, to place upon the Delinquent Tax Roll of said County, said amounts hereinbefore set forth, to be collected as provided by law.

Witness my hand as City Clerk of the City of Holdenville, Hughes County, Oklahoma, on this 16th day of September, 1912.

Seal.

J. D. Watts, City Clerk.

Certificate to the County Treasurer of the Delinquent Third Instalment of Assessment Street Improvement of District Number One of the City of Holdenville, Okla.

State of Oklahoma, County of Hughes—ss.

I, the undersigned City Clerk of the City of Holdenville, Oklahoma, do hereby certify to the County Treasurer of Hughes County, State of Oklahoma, in which County said City is located, that the third installment of Assessment, together with the yearly interest upon amounts remaining unpaid, at the rate of interest prescribed by law, from the 1st day of September, 1912, to the 1st day of September, 1913, levied by said City under its Ordinance No. 27 against the lots and tracts of land liable therefor in Street Improvement District Number 1 in said City, was due and payable on the first day of September, 1913.

And I do further certify that so much of said installment of Assessment with the interest computed and added, levied as aforesaid, as is hereinafter stated, and in the respective amounts, and against the respective lots and tracts of land hereinafter stated, designated and tabulated, became delin-

quent for want of payment thereof on the first day of September, 1913, and now remain delinquent.

And I do further certify the same to the County Treasurer, for collection, in the manner prescribed by law, and in the said respective amounts, and against the said respective lots and tracts of land, as shown in the tabulated list hereto attached, consisting of pages 1 to 5 inclusive. The columns of such tabulation headed "Lot" and "Block," give the description of each lot, tract of land, or part of lot, by number of lot and block as the same is designated and shown by the plat of said City, or addition thereto, now on file in the office of the Register of Deeds of said County, and against which said delinquent installment is levied.

And I further certify, that the column headed "Total amount Due," includes the third annual installment with the interest added thereto, on the lots, and tracts of land opposite which the description of the lots and blocks the said amount is set forth.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the said City of Holdenville, Oklahoma, this 15th day of September, 1913.

Interest chargeable at the rate of 18% from Sept. 1, 1913.

(Seal)

Clarence Edge, City Clerk.

Description of Lot or Fraction	Block	Total Am't Due
East $\frac{1}{4}$ Block.....	68 $\frac{1}{2}$	\$ 172.72
North $\frac{1}{4}$ Block.....	68 $\frac{1}{2}$	173.16
North $\frac{1}{4}$ Block.....	78 $\frac{1}{2}$	48.04
East $\frac{1}{4}$ of	52 $\frac{1}{2}$	163.37
North $\frac{1}{4}$ of	52 $\frac{1}{2}$	161.01
East $\frac{1}{4}$ of	44 $\frac{1}{2}$	159.62
North $\frac{1}{4}$ of	44 $\frac{1}{2}$	151.88
East $\frac{1}{4}$ of	33 $\frac{1}{2}$	110.21
North $\frac{1}{4}$ of	33 $\frac{1}{2}$	44.58
Total		\$1184.59

Exhibit "G".

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY
to
THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.

L E A S E.

Dated March 24, 1904.—999 Years.

An Indenture, made and entered into this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and four, by and between the Choctaw, Oklahoma and Gulf Railroad Company, hereinafter called the lessor, party of the first part, and The Chicago, Rock Island and Pacific Railway Company, hereinafter called the lessee, party of the second part.

Whereas, the lessor is a corporation organized and existing under the laws of the United States and owns and operates lines of railway in the States of Tennessee and Arkansas and in the Territory of Oklahoma and the Indian Territory; and,

Whereas, the lessee is a consolidated corporation organized and existing under the laws of the State of Illinois and Iowa, and owns and operates lines of railway in said States and in the States of Missouri, Nebraska, Kansas and Colorado, and in the Indian Territory and the Territory of Oklahoma; and,

Whereas, the said lines of railway of the lessor and of the lessee connect at the City of El Reno, Canadian County, Territory of Oklahoma, and are connecting and continuous railways:

Now, Therefore, this Indenture Witnesseth:

First. The lessor, for and in consideration of the covenants and agreements hereinafter contained on the part of the lessee to be observed, kept and performed, has let, leased and demised, and by these presents does let, lease and demise, to the lessee, its successors and assigns, the following lines of railway:

(a) The railway tracks, terminals, property and appurtenances of the lessor in the City of Memphis, Ten-

nessee, together with all ferries, inclines and other facilities for crossing the Mississippi River at said point;

(b) A line of railway extending from a point on the west bank of the Mississippi River at or near Hopefield, Crittenden County, Arkansas, opposite Memphis, Tennessee, by way of Little Rock, Pulaski County, Arkansas, to a point on the boundary line between the Territory of Oklahoma and the State of Texas, at or near Texola, Greer County, Oklahoma;

(c) The leasehold interest now or at any time during the term hereof held by the lessor in and to the railway of the White and Black River Valley Railway Company, extending from (a) Brinkley, Monroe County, Arkansas, to Jacksonport, Jackson County, Arkansas, and (b) from Wiville, Woodruff County, Arkansas, to Gregory, in said County;

(d) A line of railway extending from Little Rock, Pulaski County, Arkansas, to Hot Springs, Garland County, Arkansas, including all right, title and interest now or at any time during the term hereof held by the lessor in and to the use of the railway of the Little Rock, Hot Springs and Western Railroad Company from Little Rock, Pulaski County, Arkansas to Benton, Saline County, Arkansas;

(e) A line of railway extending from Butterfield, Hot Springs County, Arkansas, to Malvern, in said County;

(f) A line of railway extending from Wilburton, Indian Territory, to Haileyville, Indian Territory;

(g) A line of railway extending from Haileyville Junction, Indian Territory, to Ardmore, Indian Territory;

(h) A line of railway extending from Tecumseh Junction, Pottawatomie County, Oklahoma, to Asher, on the Canadian River in said County;

(i) A line of railway extending from Geary, Blaine County, Oklahoma, through Woods County, Oklahoma, to Anthony, Harper County, Kansas;

(j) A line of railway extending from Ingersoll, Woods County, Oklahoma, to Alva, in said County;

And all other lines of railway owned, leased or operated by the lessor at the time of the execution and delivery of this indenture or at any time during the term hereof, including spurs and branches to coal mines, and all right, title and in-

terest now or at any time during the term hereof held by the lessor in and to any other lines of railway in which the lessor, by lease, trackage agreement or operating contract, has any right, title or interest; all rights of way, stations, depot and terminal grounds, and all other lands and interests in land appertaining or to appertain to said lines of railway and each of them; all roadbeds, tracks, sidings, rails, ties, switches, bridges, piers, abutments, trestles, viaducts, culverts, turnouts, turntables, superstructures, fences, stations, warehouses, elevators, water stations, telegraph lines, and all other buildings, erections, fixtures, appliances and facilities, now owned or hereafter to be acquired by the lessor or hereafter added to said railways or any of them; all rolling stock and equipment of every description, including locomotives, cars and vehicles of every kind now owned or possessed, or which may hereafter during the term be acquired by the lessor; all tools, implements and machinery, instruments, furniture, safes, books, accounts and bills receivable, cash on hand, stocks, bonds, maps, field notes, surveys, charts, materials, supplies, personal property and claims or causes of action of every character now or hereafter during the term belonging or accruing to the lessor; together with all and singular the property, rights, privileges, franchises, tenements, hereditaments and appurtenances to the said railways and each of them belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the lessor of in and to the same and every part and parcel thereof, with the appurtenances, whether now held or hereafter acquired;

To Have and To Hold unto the lessee, its successors and assigns, for a term of nine hundred and ninety-nine (999) years beginning on the date hereof;

Subject, however, as to the property embraced therein severally and respectively, to the lien thereon of the following mortgages and equipment trust agreements, to-wit:

1. Choctaw, Oklahoma and Gulf Railroad Company General Mortgage to the Girard Life Insurance, Annuity and Trust Company of Philadelphia as Trustee, dated October 3, 1894, securing an issue now outstanding of \$5,500,000, face value, of five (5) per cent bonds maturing October 1, 1919;

2. Choctaw and Memphis Railroad Company Mortgage to the Girard Life Insurance, Annuity and Trust Company of Philadelphia as Trustee, dated January 2, 1899, securing an

issue now outstanding of \$3,525,000, face value, of five (5) per cent bonds maturing January 1, 1949;

3. Little Rock Bridge Company Mortgage to Girard Trust Company as Trustee, dated June 29, 1899, securing an issue now outstanding of \$355,000, six (6) per cent bonds maturing July 1, 1919;

4. Choctaw, Oklahoma and Gulf Railroad Company Consolidated Mortgage to Girard Trust Company as Trustee, dated May 1, 1902, securing an issue of five (5) per cent bonds maturing May 1, 1952, authorized to be issued in the aggregate sum of \$30,000,000, of which \$5,411,000 are now outstanding;

5. Equipment Trust Agreement or Lease between Girard Trust Company and Choctaw, Oklahoma and Gulf Railroad Company, dated July 1, 1900, securing an issue now outstanding of \$100,000 five (5) per cent equipment trust certificates maturing, \$50,000 October 1, 1904, and \$50,000 October 1, 1905;

6. Equipment Trust Agreement or Lease between Clement B. Newbold, Girard Trust Company and Choctaw, Oklahoma and Gulf Railroad Company dated May 1, 1901, securing an issue now outstanding of \$650,000 of five (5) per cent equipment trust certificates maturing in installments on the first day of February and of August in each year until and including the year 1908;

7. Equipment Trust Agreement or Lease between Edward B. Smith, Girard Trust Company and Choctaw, Oklahoma and Gulf Railroad Company, dated February 24, 1902, securing an issue now outstanding of \$1,540,000 four and one-half ($4\frac{1}{2}$) per cent equipment trust certificates maturing in installments on the first day of April in each year until and including the year 1910.

The lessee, its successors and assigns, yielding and paying therefor the sums hereinafter specified, and keeping and performing all and singular the covenants and agreements hereinafter set forth to be by the lessee observed, kept and performed.

Second. The lessee agrees to account to the lessor for all operations of the demised railways from the day of the date hereof until midnight of March 31, 1904, and does hereby assume the payment of all current and unsecured indebtedness of the lessor as of said March 31, 1904; in consideration thereof, the lessor does hereby irrevocably authorize the lessee throughout the term of this lease to exercise in respect of all stocks and bonds at any time during the term owned by the

lessor all rights, powers and discretions which the lessor as such owner might or could exercise, including the right to sell, pledge or otherwise dispose of the same, and to devote the proceeds thereof to its own use, and to exercise such rights, powers and discretions in the name of the lessor, or in the name of the lessee; the lessor hereby irrevocably constituting the lessee, during the term of this lease, its lawful attorney, with full power of substitution and revocation, in the name and stead of the lessor, to execute and deliver all such instruments, proxies and powers as may, in the judgment of the lessee, be necessary or proper, and the lessor hereby ratifies and confirms all action which the lessee or any substitute may take or cause to be taken by virtue hereof. The lessor does further irrevocably authorize the lessee throughout the term of this lease to collect in the name of the lessor or otherwise and to retain for its own use, the interest on the bonds or other indebtedness from time to time during the term held by the lessor, or to which the lessor may be or during the term become in any manner entitled, and the dividends on all stocks from time to time during the term held by the lessor, or to which the lessor may be in any manner entitled, and the lessor will, at the request of the lessee, collect and forthwith pay over to the lessee all such interest and dividends.

Third. The lessor, reserving to itself all coal mines, coal leases and coal or mineral lands now or at any time during the term held, owned or acquired by the lessor, or in which the lessor has or may have any right, title or interest, covenants to and with the lessee that the same shall be maintained, improved and operated to the extent and in such manner as shall lawfully be required by the lessee, to the end that the business of the lessee as a common carrier may thereby be benefited and enlarged.

Fourth. The lessee, in consideration of the premises, accepts under the provisions hereof the premises and property hereby demised for the term hereby granted, and covenants to and with the lessor to pay yearly and every year during the term hereby granted, by way of rental therefor, the sum of the following amounts:

(a) the sum of one dollar, lawful money of the United States, on the first day of January in each year;

(b) all taxes that may be imposed, assessed or levied upon the lessor or upon the demised premises and property, or any part thereof, or upon the earnings thereof, as the same shall become due and payable;

(c) all rentals or other compensations due or owing

by the lessor under or by virtue of the provisions of any lease, trackage arrangement or operating contract under and by virtue of which the lessor has the right to use the railway, or any part thereof, of any other railway company;

(d) an amount equal to the interest accruing on the said \$5,500,000 five per cent General Mortgage bonds of the lessor, the said \$3,525,000 five per cent bonds of Choctaw and Memphis Railroad Company, the said \$355,000 six per cent bonds of Little Rock Bridge Company, the \$5,411,000 Consolidated Mortgage five per cent bonds of the lessor and all of such Consolidated Mortgage bonds hereafter issued by the lessor at the request or with the consent of the lessee; such payments to be made by payment of said interest as it accrues to the holders of said bonds in accordance with the terms thereof and of the mortgages or deeds of trust securing the same;

(e) an amount equal to the interest on the aforesaid equipment trust certificates of the lessor, such payments to be made as they severally and respectively accrue, to the persons entitled thereto in accordance with the terms of said equipment trust certificates and of the respective agreements securing the same, severally and respectively.

Fifth. The lessee covenants to and with the lessor as follows:

The lessee shall and will save harmless and indemnify the lessor from and against all causes of action, legal or equitable, arising by reason of the acts or neglect of the lessee, or of the failure by the lessee or any of its officers, agents or employes to fulfill any duty toward the lessor or toward the public or any person or persons whomsoever, which the lessor by reason of its ownership or the lessee by reason of its occupancy of the demised premises, or otherwise, may owe; and shall and will at its own cost and expense, defend such actions which may be brought against the lessor, and shall pay all amounts which may be recovered therein against the lessor for or upon the said causes of action.

The lessee will, during the term of this lease, keep and maintain the demised lines of railway of the lessor in good and proper condition for the passage thereover of both freight and passenger traffic, and shall and will keep and maintain in good repair, working order and condition the tracks, depots, terminal facilities and other demised property, using suitable materials for renewal of the same as renewal shall from time to time become necessary.

Sixth. The lessor covenants to and with the lessee as follows:

The lessor shall and will maintain, renew and keep up during the term of this lease its corporate existence and organization so long as permitted by law so to do, and at all times and from time to time during said term, when requested by the lessee, shall and will put forth and exercise each and every corporate power and do each and every corporate act which the lessor now or at any time hereafter may lawfully put in force or exercise, to enable the lessee to enjoy and avail itself of and exercise every right, franchise and privilege hereby granted and the proper operation and management of the demised premises according to the terms of this lease, and shall not and will not commit or omit, or suffer or allow to be committed or omitted, any act whereby its corporate existence or powers may be annulled, abridged or affected.

The lessor shall and will from time to time and at all times hereafter at the request of the lessee, make, execute and deliver at all such other and further instruments and assurances in the law for the better or more particular assuring of the demised premises upon the conditions aforesaid, according to the true intent and meaning of these presents, as by the lessee shall be reasonably advised or required.

Seventh. It is mutually covenanted as follows:

The lessee shall and will, at the determination of this lease, re-deliver and surrender up to the lessor the demised premises and property in good order and condition, ordinary wear and tear excepted, with such additions, alterations and improvements as shall have been made thereto, subject, however, to any then existing encumbrances created by the lessor or by the lessee upon the demised premises or any part thereof, or upon the lessee's interest therein, and upon payment by the lessor to the lessee of the then value, over and above any and all such encumbrances, of all such additions, alterations and improvements, including equipment.

If the lessee shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of three (3) months, or shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements thereof, and such default shall continue for the space of three (3) months after service by the President of the lessor upon the President of the lessee of a written notice specifying such

default and requiring the lessee to remedy the same, then, and in either of such cases, the lessor may at any time, either:

(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the lessee or to recover damages for the breach thereof; or

(b) by notice in writing determine this lease, and thereupon enter into and upon the demised property, and shall thenceforth hold, possess and enjoy the same free from any right of the lessee, or its successors or assigns, to use the demised premises for any purposes whatever; and thereupon any right, title and interest of the lessee to the use of the demised premises shall absolutely cease and determine as though this lease had never been made; but the lessor shall, nevertheless, have the right to recover from the lessee any and all amounts which under the terms hereof may be then due and unpaid for the use of the demised premises.

At any sale under foreclosure of this lease and of the rights, privileges and property of the lessee under this lease, in pursuance of any of its provisions, the lessor shall have the right to become the purchaser thereof free and discharged from all equity of redemption on the part of the lessee and from any and all claims of the lessee therein and thereto.

In no event shall the stockholders of the lessee or of the lessor be held to any individual liability as stockholders for any default, damages or other breach of obligation, whether of this lease or of any instrument made in pursuance thereof by either party thereto.

Nothing contained in this indenture shall prevent the consolidation or merger with or sale to the lessee of the railways and property of the lessor or of any other railway company, or any consolidation or merger of the lessee with any other corporation, or any conveyance, mortgage, transfer or lease by the lessee of its property, including its leasehold interest in the demised premises.

Eighth. Anything to the contrary in this indenture notwithstanding, this lease shall be subject to termination by the lessor or by Central Trust Company of New York, as trustee, or by any successor trustee, of that certain trust agreement dated May 1, 1902, between the lessee and said Central Trust Company of New York as trustee, securing an issue limited to \$24,000,000 of the Four Per Cent Gold bonds of 1902 of the

lessee, upon the happening of an event of default as defined in section 2, Article Six of said trust agreement dated May 1, 1902.

Anything to the contrary in this indenture notwithstanding, this lease shall be subject to termination by the lessee in case the shares of stock of the lessee held by the Central Trust Company of New York under that certain trust agreement bearing date August 1, 1902, executed to said Trust Company by the Chicago, Rock Island and Pacific Railroad Company shall be sold because of any default by the Chicago, Rock Island and Pacific Railroad Company under said trust agreement dated August 1, 1902.

Ninth. Nothing in this indenture expressed or implied is intended or shall be construed to confer or to give to any person or corporation, other than the parties hereto, any right, remedy or claim under or by reason of this indenture, or of any covenant, condition or stipulation thereof; and all the covenants, stipulations, promises and agreements in this indenture contained shall be for the sole and exclusive benefit of the parties hereto.

The provisions of this Ninth Article shall not, however, be construed so as to limit or in anywise affect the rights in and by the Eighth Article of this indenture, given to Central Trust Company of New York, as trustee, or any successor trustee under the trust agreement between the lessee and said Central Trust Company of New York, dated May 1, 1902.

Tenth. All the covenants, stipulations and agreements in this indenture shall extend to and bind the successors and assigns of the parties respectively, by and to whom the same have been made.

In Witness Whereof, each of the parties hereto has caused its corporate seal to be hereunto affixed and this lease to be signed by its president or vice-president, and its secretary or assistant secretary, the day and year first above written.

Choctaw, Oklahoma and Gulf Railroad Company,
(Corporate Seal)

By C. H. Warren
Vice-President.

Attest:

Geo. H. Crosby, Secretary.

The Chicago, Rock Island and Pacific Railway
Company,

(Corporate Seal)

By Robt Mather
Vice-President.

Attest:

G. T. Boggs, Assistant Secretary.

Signed, sealed and delivered by Choctaw, Oklahoma and Gulf Railroad Company in the presence of H. J. Renn, E. Christiansen.

Signed, sealed and delivered by The Chicago, Rock Island and Pacific Railway Company in the presence of J. J. Quinlan, Fredk. Flynn.

State of Illinois, County of Cook—ss.

On this 24th day of March, A. D. 1904, before me, the undersigned, a notary public in, within and for the county and state aforesaid, personally appeared C. H. Warren, to me well known as the Vice-President of the Choctaw, Oklahoma and Gulf Railroad Company, the within named lessor, a corporation, and George H. Crosby, to me well known as the Secretary of said corporation, with both of whom I am personally acquainted, and whom I know to be the identical persons who subscribed the name of the maker thereof to the foregoing instrument, and each of them upon oath acknowledged himself to be the Vice-President and Secretary, respectively, of said corporation, and they acknowledged to me that they had as such officers and in their said official capacities executed the same as the free and voluntary act and deed of said corporation, for the consideration, uses and purposes therein mentioned and set forth, being authorized so to do, by signing the name of said corporation by themselves as such Vice-President and Secretary, respectively, and each of them also acknowledged to me that he executed the same as his free and voluntary act and deed for the consideration, uses and purposes therein mentioned and set forth.

Witness my hand and official seal, at office in the City of Chicago, Illinois, this 24th day of March, 1904.

(Notarial Seal)

C. Nyquist,

Notary Public, Cook County, Illinois.

State of New York, County of New York—ss.

On this 25th day of March, A. D. 1904, before me the undersigned, a notary public in, within and for the county and State aforesaid, personally appeared Robt. Mather, to me well known as the Vice-President of The Chicago, Rock Island and Pacific Railway Company, the within-named lessee, a corporation, and G. T. Boggs, to me well known as the Assistant Secretary of said corporation, with both of whom I am personally acquainted, and whom I know to be the identical persons who subscribed the name of the maker thereof to the foregoing instrument, and each of them upon oath acknowledged himself

to be the Vice-President and Assistant Secretary, respectively, of said corporation, and they acknowledged to me that they had as such officers and in their said official capacities executed the same as the free and voluntary act and deed of said corporation, for the consideration, uses and purposes therein mentioned and set forth, being authorized so to do, by signing the name of said corporation by themselves as such Vice-President and Assistant Secretary, respectively, and each of them also acknowledged to me that he executed the same as his free and voluntary act and deed for the consideration, uses and purposes therein mentioned and set forth.

Witness my hand and official seal, at office in the City of New York, New York, this 25th day of March, 1904.

(Notarial Seal)

Emma Walter

Notary Public, New York County, New York. No. 11.

Exhibit "H".

East $\frac{1}{4}$ block of block 68 $\frac{1}{2}$	\$ 1107.18
North $\frac{1}{4}$ block of block 68 $\frac{1}{2}$	1110.01
East $\frac{1}{4}$ block of block 78 $\frac{1}{2}$	307.94
East $\frac{1}{4}$ block of block 52 $\frac{1}{2}$	1047.23
North $\frac{1}{4}$ block of block 52 $\frac{1}{2}$	1032.08
East $\frac{1}{4}$ block of block 44 $\frac{1}{2}$	1023.17
North $\frac{1}{4}$ block of block 44 $\frac{1}{2}$	973.64
East $\frac{1}{4}$ block of block 33 $\frac{1}{2}$	706.48
North $\frac{1}{4}$ block of block 33 $\frac{1}{2}$	285.81

Exhibit "I".

Section 1: That a levy be and the same is hereby made a charge, assessment and tax against the following lots and tracts of land benefitted in the City of Holdenville for the grading, paving, curbing, guttering and draining of Street Improvement District Number One the same comprising a portion of the streets as hereinafter set forth: That portion of Oklahoma Avenue from the intersection of the St. Louis and San Francisco Railroad right of way and the right of way of the Rock Island Railroad at the Union Station and extending to the southeast side of Oak Street:

Orig. No. of Town Block	Lot or part of lot	Amount
	e $\frac{1}{4}$ blk of blk 68 $\frac{1}{2}$	\$ 1107.18
	n $\frac{1}{4}$ blk of blk 68 $\frac{1}{2}$	1110.01
	e $\frac{1}{4}$ blk of blk 78 $\frac{1}{2}$	307.94
	east $\frac{1}{4}$ block of block 52 $\frac{1}{2}$	1047.23
	north $\frac{1}{4}$ block of block 52 $\frac{1}{2}$	1032.08
	east $\frac{1}{4}$ block of block 44 $\frac{1}{2}$	1023.17
	north $\frac{1}{4}$ block of block 44 $\frac{1}{2}$	973.64
	east $\frac{1}{4}$ block of block 33 $\frac{1}{2}$	706.48
	north $\frac{1}{4}$ block of block 33 $\frac{1}{2}$	285.81

Endorsed: Filed Apr. 26, 1916, R. P. Harrison, Clerk
U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 24th day of June, A. D. 1918, the defendants herein filed Statement of the Evidence, which is in words and figures as follows:

**Appellants' Statement of the Evidence and Proceedings Had
at the Trial of Above Case to Be Embodied
in Record on Appeal.**

The above cause was submitted to the Court on June 22, 1916, on the complaint, the answers thereto, the agreed statement of facts filed therein, elsewhere called stipulation, and the oral testimony submitted by complainants and defendants, which oral testimony was as follows:

J. G. GAMBLE, a witness for complainants, testified as follows:

"My name is J. G. Gamble. Was employed by the Chicago, Rock Island & Pacific Railway Company as attorney during 1911. Under the direction of Mr. Blake I went to Holdenville during 1911 or 1912 and made an investigation with reference to the paving of Oklahoma Avenue. I was directed to go to Holdenville and ascertain whether in the description of the property assessed the land occupied by the Railway Company was included. I do not recall the date when I first went to Holdenville, but was there on two or three occasions. I saw the mayor, whose name was Singleton; I saw the city clerk and the city engineer, whose names I have forgotten, and I saw Mr. I. A. Draper, who was at one time city

clerk of the city of Holdenville. I found on the minutes of the proceedings of the city council at Holdenville, under date of June 29, 1910, a record of the motion concerning the adoption of a certain plat. I afterwards drew the bill in this case and it contained an accurate copy of that record. I made inquiry of Mr. Singleton, the mayor, for the map or plat referred to and also of the incumbents of the city clerk's office and of the city engineer in his office. In response to the inquiry I was told that neither of them knew where the map was or what it contained or what the descriptions I was inquiring about, being referable to certain half blocks, blocks denominated by number in half numbers that are set out in the stipulations and the bill in this case, as to what they covered. I made this inquiry separately of each of the officers named and I went to Mr. Draper's office. He told me there was a map but where it was or what it contained he did not remember. I made efforts similar and from the sources on, as I say, two or three occasions, and while there made copies of the records of the proceedings of the council which were subsequently incorporated in the pleadings in this case. I went to the office of the Register of Deeds while in Holdenville on one of these occasions, and investigated such plats as were on file in his office and found no plats of the City of Holdenville including any such blocks as are denominated in paragraph 10 of the stipulations. I secured a printed copy of what purported to be a government map attached as Exhibit "A" to the Stipulations which likewise showed no such blocks, and I do not recall what steps I took to ascertain whether there was a recorded plat showing these blocks but I went to all sources I could think and found no plat showing the blocks enumerated as are these and I could not tell from the record of the proceedings of the city council what property was intended to be included in the blocks enumerated as stated in paragraph 10 of the stipulations for the reason that there was no description other than the numerals included as I now remember.

On cross-examination Mr. Gamble testified:

I have been employed by Rock Island since April 1st, 1911. Was not with the Company before that time. Prior to that I practised law at Montgomery, Alabama. Was not with the Rock Island in 1910. I was never at the house of the city clerk of Holdenville, and I never met the city clerk at Holdenville at his house at night or any other time, and I never got a transcript of the proceedings from the city clerk of Holdenville. A representative of the Railway Company, on June 1st, 1910, according to my understanding, obtained a tran-

script of the proceedings of the city council relating to this pavement up to that time. My understanding was that Mr. W. H. Moore in company with his clerk, Mr. Cable, got the transcript from Mr. Draper, the city *attorney*. Mr. Moore at that time was an assistant attorney of the Rock Island under Mr. Blake, their general counsel. I had nothing to do with the proceedings and made no inquiry with reference to them until some time in 1911 or 1912. I am not able to fix the date definitely. The first I had to do with these proceedings was after a communication from Spitzer, Rorick & Company was sent to our office through our real estate and taxation department concerning their claims that the Railway was subject to this assessment. I understood Spitzer, Rorick & Company had bought the bonds. That was my first knowledge of the proceedings when they were called to my attention through the tax department that the Company hadn't paid its assessment.

F. P. RUTHERFORD testified on behalf of the defendants as follows:

I am the present mayor of the city of Holdenville; was mayor of said city during the years 1910 and up to July 4, 1911. Was mayor of the city of Holdenville during the proceedings for the paving of street improvement district No. 1. I remember about the adoption of a map subdividing the Rock Island right-of-way and station grounds into quarter blocks. I have that map with me. The map is identified and offered and admitted as defendant's Exhibit "A"; that is the map showing the platting of the Railroad right-of-way and station grounds for assessment purposes. The map was adopted on June 29, 1910, and filed with the city clerk. It was filed the night it was adopted; was turned over to his possession and retained like all other documents. By filing I mean it was placed in his care and keeping. There was no file mark of record made on it that I know of. I did not do that personally. I was right in council meeting the night it was adopted and turned over with all other papers.

(Witness' statement that it was filed with the clerk was ordered stricken by the trial judge; remainder of his testimony as to details permitted to remain in the record.)

That map remained in the city clerk's office with the files during the proceedings until after the assessing ordinance was passed in August, I don't know just how much longer after that. I do not know whether that map was on file when the bond resolution was passed on October 20, 1910. I think the

transcript was made up and sent to Spitzer, Rorick & Company before the bond resolution was passed; that is my recollection now. That is my recollection, after the assessing ordinance was passed in August, the 25th of August, I believe. The process of getting our money on the bonds that were issued was as follows: The council passed resolutions authorizing the issuance of certain bonds, directing certain numbers in certain amounts, directing the clerk and myself to sign such bonds and attach copies of the resolution to the bonds and draw on Spitzer, Rorick & Company through the First National Bank there. That was done weekly, i. e., as the work progressed. Our process of sending these bonds and getting the money out of them was to make and send a transcript of the proceedings up to date with certain bonds attached with sight draft attached on Spitzer, Rorick & Company. That was continued right along. My recollection is that when we made our first draft on Spitzer, Rorick & Company we sent a complete transcript of the proceedings with that draft and with certain bonds. I think with that transcript this map (Defendants' Exhibit "A") was sent to Spitzer, Rorick & Company with our first sight draft accompanied by bonds. That would be after the passing of the bond resolution; bonds would not be issued until after the resolution was passed. I remember a representative of the Rock Island Railroad calling on me during the summer of 1910 during the progress of these proceedings on more than one occasion. The Rock Island representative would call in. Once, he and the clerk came into my place of business to see about the assessing ordinance, after the assessing ordinance had been passed, and he was during the summer and fall while we were proceeding with these paving improvements. The records of the city were open to his inspection always. I remember a representative of the Rock Island receiving a copy of the assessment ordinance. I don't remember when it was any more, but it was after the publication. The circumstance that I do remember is that he and Mr. Draper, who was the city clerk, came into my place of business with a copy of the paper which carried this publication of the assessment ordinance and we were discussing it there in my store, and he was rather criticising us for paying too much for the paving. He said he thought it ought to have been done cheaper than that, and that their Rock Island engineer said it could be done for a less price. I don't remember the figures. His conclusion was we were paying too dearly for the paving. He had a copy of the paper containing the assessing ordinance that showed the amount of the assessment against the Rock Island Company. I don't

know who that representative was. I would have said, and was under the impression, it was Mr. Gamble. Mr. Gamble was in there at different times, and I *knew* him in Holdenville several times, possibly after the paving was put down, but I had it in mind that it was Mr. Gamble. He represented himself as an attorney for the Rock Island. A Rock Island engineer was in to see me several times. He was shown a map. I don't know what his name was. We discussed how to get rid of the drainage of the storm sewer and get it under their tracks. We put a storm sewer under their tracks and that was arranged with the engineer. He discussed it with us and was in my place of business more than once to see how we were going to get rid of the storm sewer. I do not remember that he ever made any inquiry whether their property had been assessed for this paving district. I never told any of their representatives that there was no assessment against their property. I never told any of their representatives that there was no map or plat.

On cross examination Mr. Rutherford testified:

We had our contract concerning the indebtedness on account of this paving with the contractor who did the paving. We made the contract with Shelby-Downard Asphalt Company. We paid the Shelby-Downard Asphalt Company by their direction. We took the bonds direct and drew on Spitzer, Rorick & Company. We paid for this paving with the paving bonds. Bonds were made to Shelby-Downard Asphalt Company but the drafts were attached and drawn through their bank and on Spitzer, Rorick & Company. The city clerk made up the transcript of these proceedings referred to by me and sent it away. I don't know to whom Mr. Draper delivered the transcript. When I testified a while ago in substance that it was sent at the time we sent the first draft I thought that was the way it was done. That is the way we did all along. I am not positive as to the exact date when the transcript of the council proceedings was first transmitted to the Shelby-Downard Asphalt Company, nor when it was first transmitted to Spitzer, Rorick & Company. I cannot give the exact date; I did not transmit them personally. I am not just positive that this map was inclosed in the first of the transcripts that were forwarded. This map all the time after it was adopted and before it was forwarded to Spitzer, Rorick & Company was in the city clerk's office. The city engineer had an enlarged map in his office. The transcript was forwarded, I think, after the bond ordinance was passed. The assessing ordinance was passed the 25th of August. The bond ordinance was passed October 20th. This transcript of the

proceedings was forwarded after the bond resolution. That is my impression that they went with the first bonds. Attached to this map (Defendants' Exhibit "A") is an affidavit signed by W. H. Harris. I know of him. This affidavit says: "The map of paving District No. 1 of the City of Holdenville, Oklahoma, hereto attached is identified by me, is the original map of improvement district which came into my hands on or about September 25, 1910." I said before I did not know the date, but my impression was it (the map) went with the first abstract and bonds. I am engaged in the clothing business. The Rock Island attorney called on me and got a copy of this assessing ordinance. I don't remember his name, I was under the impression it was Mr. Gamble. It was some time after it was published. It was published on the 26th of August. I could not say how nearly that date. All I know is it was after it was in the paper because he had a copy of it. I don't know as I would know W. H. Moore, possibly would recognize him. I don't remember who it was that was there; I don't call to mind the name now. As to whoever it was got this copy he came in my place of business and complained to me about the price of the paving. I don't know what he was there for; he had a copy of the paper in his hand and referred to it. I know Mr. Wilhoyt. It was not he. I don't know that I know Mr. Moore; I might. The occasion of this visit by this gentleman saying he was an attorney was not on the 1st day of June, 1910, it was after that date. I do not remember whether or not the city entered into a contract with the Railroad Company concerning the passage of the storm sewer under the tracks. I don't remember about a contract but probably there was one. I don't remember when it was. I do remember it was during the progress of the work. He was there at different times; I don't remember what date. I just remember he was there at the time we were discussing it. Mr. Draper, I think, drew the draft on Spitzer, Rorick & Company. I think Mr. Draper was directed by the council to draw the draft and forward it and forward the bond. C. F. Roberts was the city treasurer at the time. I don't think he drew the draft. I think Mr. Draper drew them.

Re-direct Examination of Mr. Rutherford:

I remember Mr. Draper, the city clerk, and I would often go down to the bank together and make these drafts, don't know that we always did but we often did. Mr. Draper would often come into my store after they were issued and we would sign up the drafts with certain bonds attached and certain transcripts.

I. O. DRAPER testified as a witness on behalf of the defendants as follows:

My name is I. O. Draper. During 1910 and up to July 4, 1911, I was city clerk of the city of Holdenville and as city clerk had in my possession the records of the council proceedings of said city and kept the minutes of the meetings. I have seen the map which has been identified as defendants' Exhibit "A" before. It was adopted June 29, 1910, by the mayor and council. After its adoption it was filed in my office. It remained in my office as city clerk all the time from its adoption until it was given to Gilkerson & Levy to be sent to Spitzer, Rorick & Company. That map was not in a transcript of proceedings that I sent to Spitzer, Rorick & Company. I don't remember just when he did send it to Spitzer, Rorick & Company. I don't remember just how long that map remained in my office. There was a map in the city engineer's office showing this paving district. It was a large map tacked up on the wall over his drafting table. I went over that map with a representative of the Rock Island Railroad; my impression was that it was Mr. Gamble, it might have been * * * they were both in to see me several times. Then I also went over it with an engineer that they sent there. He pretended to represent the Rock Island as one of the assistant attorneys. He was there to obtain information. I went over that map with those people and showed them this paving district several times. I don't remember when this attorney first came and went over the map in the city engineer's office; it was after June 1st, 1910, and before January 1st, 1911. I don't remember how long after June 1st. I never was called on by a representative of the Rock Island for a transcript. Mr. Moore, or some representative called on me about June 1st. Found me at my home. He came down to my home and said the Rock Island Railroad Company understood that we were doing some paving and we talked on the subject. I was under the impression it was Mr. Gamble, or it may have been Mr. Moore. I told him I had a copy of the proceedings at my house and he said he would like to look over them and he said would I have any objections to taking it to his office at El Reno and I said no, but return it to me for it was a copy. That contained the first and second resolutions and advertisements for bids. He took the transcript with him. He called on me at a later date after the assessment ordinance had been passed. We talked about the assessment, went over the records and went over to the print shop and got a paper. I went with this representative of the Rock Island. We got a copy of the paper at the print shop containing the assessing ordinance. We

then went to Mr. Rutherford's store. We talked there and Mr. Rutherford told both of us he thought the paving pretty high; that their engineer said it could be done cheaper. We had a copy of the assessing ordinance before us at that time. I don't remember how long after the ordinance was printed that we had that conversation; it was after it was printed. The representative of the Rock Island called on me several times with reference to these proceedings between June 1st, when I gave him a transcript of the proceedings, and the conference we had at the time we had the printed copy of the assessing ordinance. The local agent was there several times. We talked several times about the outlet for the storm sewer. These proceedings and records as city clerk and these maps were at all times open to inspection to any person that might inquire. I never told the representative of the Rock Island, or anyone else, that their property had not been assessed. I talked over the sub-division of this property with the representative of the Rock Island, the attorney, at the time the mayor, Mr. Rutherford and I were talking at his store. He was the same person who got the transcript from me on June 1st. That transcript was returned to me. I do not have any letter that would refresh my memory concerning it, as to who it was.

On cross examination Mr. Draper testified as follows:

This map (defendants' Exhibit "A") was turned over to Gilkerson & Levy; they were sub-contractors. They forwarded it to Spitzer, Rorick & Co. I did not. I saw it put in the office. I did not include this map in the transcript of the proceedings. It is a mistake when it is stated that this map was included in the transcript that went to Spitzer, Rorick & Co. I prepared that transcript. I do not recall the day I delivered this map to Gilkerson and Levy. I believe I turned it over to Mr. Levy; he is a lawyer in Muskogee. I am sure I didn't turn it over to the First National Bank of Holdenville. I am sure I turned it over to Mr. Levy or Mr. Gilkerson, I don't recall the date. If I remember right, somewhere around September or October; I place it within a month's time. It might have been a month before this. I have nothing to recall it to mind right now to fix any date. Mr. Moore came to my house and got a transcript of the proceedings and returned it to me. Those proceedings showed no adoption of that map. He wrote me a letter when he returned the transcript to me. I got several letters from him, and that same gentleman came to see me again and went with me up to see Mr. Rutherford. We also went up to the city engineer's office and talked over the plat. That plat shows block 64½. The city engineer made it; his

name is McIntosh. He was the city engineer at that time. He lived in Oklahoma City. He had a special contract with the city of Holdenville. We had no city engineer that resided in the city of Holdenville. There was a change in the city engineer's place under the commission form of government; that commission form started July 4, 1912. I don't know that Mr. McIntosh was city engineer up to July 4, 1912; I don't remember when they paid him off but he was engineer for all this paving proposition. He left Holdenville after the paving was over. He did not take his map along with him. I have that map in my real estate office. The large map wasn't the one the council adopted; it was the same as the one adopted; it was a larger map. It was the original map that was adopted. I didn't record this map anywhere nor mark it filed. I sent the original map away. I had a small copy made by McIntosh at the same time the original was made, after the adoption of the map. So far as I know it was not marked with any identification as being the map adopted on June 29th. None of them were. The station agent called on me concerning this map, Smith, I believe, is his name. It wasn't Mr. Wilhoit; I know Mr. Wilhoit. The station agent's name was F. A. Smith. I don't remember just what time he saw me, he called on me several times. I did not state to him on some date between July 2nd and July 11th that there had been no additional proceedings or ordinances in the matter of this paving since the transcript was furnished to Mr. Moore for his files. I don't remember that Mr. Smith exhibited to me a copy of a letter from Mr. Moore, the attorney. I don't remember what he did say when he came there; he was there several times about several propositions. He was up there several times during the progress of this paving. I cannot fix the date any more definite than that. It was the attorney who came to see me. He said he lived at El Reno and he is the one that got the transcript and sent it back.

T. E. ARNOLD testified on behalf of defendants as follows:

My name is T. E. Arnold. I live in Holdenville. I was one of the appraisers that appraised the cost of the improvement for improvement district number one at Holdenville. I have heretofore seen the map which has been marked for identification Defendants' Exhibit "A". We had that map before us when the appraisers apportioned the costs of the improvements to the property in that improvement district. We used this map. Mr. Draper, the city clerk, furnished us

that map. He gave us a copy of the resolution appointing the appraisers at the same time and we worked from those papers.

Mr. DRAPER was recalled and on examination by the Court testified as follows:

Several times this representative of the Company called on me during the summer. It was the same man all the time. Mr. Gamble called on me several times. During the summer of 1910 it was the same man; I thought it was Mr. Gamble, but in view of Mr. Gamble's testimony I now think it was someone else. At any rate it was the same man that called on me, and this man who called on me about the 10th of June was the same man that called thereafter.

Judge, you asked me a while ago if I remembered correctly. I won't say now that Mr. Moore is the man that was there in Mr. Rutherford's store after the assessing ordinance was passed. At different times there were different employees of the road coming there talking to me. I knew their names at that time. I didn't say sure it was Mr. Moore that looked over the map with me. Mr. Gamble was down there several times the next year in 1912. I remember seeing him there and talking over this matter. I want to say this, that while the map was in the engineer's office, was on the wall, after the paving was over I took it up to my office, the big plat; that was the engineer's private plat. I left the city clerk's office July 4, 1911. The big map was there up to that time. That was the wall map."

Defendants' Exhibit "A", marked for identification and offered in evidence, shows the platting of the Railroad right-of-way and station grounds into quarter blocks for assessment purposes, and with the endorsements thereon and the affidavits attached thereto is as follows:

(Exhibit "A" is a map of Street Improvement District No. 1, and is the same map marked Exhibit "C" attached to the Stipulations.)

State of Ohio, Lucas County—ss.

Personally appeared before me a Notary Public in and for Lucas County, Ohio, Grant R. Gibson, who being duly sworn says: I have been in the employment of Spitzer and Co., and its successors, the firm of Spitzer, Rorick & Company

since prior to September 1, 1910, and continuously since that date. As a part of my duties in the employment of said firms I have had continuously since said date and now have charge of the files of said firms in which are kept all papers and transcripts of the records of proceedings evidencing the legality of issues of bonds and other securities purchased by said firms.

I identify the map of Paving District No. 1, of the City of Holdenville, Oklahoma, hereto attached as the original map of said improvement district, which came into the possession of Spitzer and Company on or about September 23, 1910, the same having been received from Messrs. Gilkerson & Levy, general contractors of Muskogee, Oklahoma, who were at that time engaged in the work of making such paving improvements in the said City of Holdenville. Said plat has been continuously in the files of Spitzer and Company and Spitzer, Rorick & Company, except during a short time in September, 1910, when it was in the hands of Mr. W. H. Harris for his examination in passing upon the legality of the paving proceedings and issuance of bonds in payment for said pavement. Said map or plat was returned to Spitzer and Company by W. H. Harris shortly after September 23, 1910, and has been continuously in the files of Spitzer and Company and Spitzer, Rorick & Co., to this date.

(Signed) Grant R. Gibson.

Subscribed and sworn to before me at Toledo, Ohio, this 27th day of January, 1913.

(Seal)

(Signed) James W. Harbaugh,

Notary Public in and for Lucas County, Ohio.

State of Ohio, Lucas County—ss.

Personally appeared before me a Notary Public in and for Lucas County, Ohio, W. H. Harris, who being duly sworn says: The map of Paving District No. 1 of the City of Holdenville, Oklahoma, hereto attached is identified by me as the original map of said improvement district which came into my hands on or about September 23, 1910, from Spitzer and Company, for my examination in passing upon the legality of the proceedings taken by said City of Holdenville in the making of paving improvements in said District No. 1, and the issuance of Street Improvement Bonds in payment therefor. The figures in pencil on said map on the quarter blocks designated $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$, $78\frac{1}{2}$, were made by me when checking the amounts of assessments against said quarter blocks as shown on said map. Said map remained in my pos-

session for several days for the purpose of checking such assessments against the property located in said Improvement District to be assessed for the cost of said paving improvement, and was thereafter returned by me to Spitzer and Company from whom I received it.

(Signed) W. H. Harris.

Subscribed and sworn to before me at Toledo, Ohio, this 28th day of January, 1913.

(Seal)

(Signed) James W. Harbaugh,
Notary Public in and for Lucas County, Ohio.

The above and foregoing constitutes all the oral testimony offered or introduced at the trial of said cause by either party hereto.

The foregoing Statement of the Evidence in this case is hereby approved and the clerk of this Court is hereby ordered to file the same and when the same is filed it shall constitute and be a part of the record in this case.

This the 24th day of June, 1918.

RALPH E. CAMPBELL, *Judge*.

Endorsed: Filed Jun. 24, 1918, R. P. Harrison, Clerk
U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 7th day of February, A. D. 1918, the same being one of the days of the regular January, 1918, term of the United States District Court for the Eastern District of Oklahoma, Court met pursuant to adjournment at Muskogee, Oklahoma. Present and presiding the Honorable RALPH E. CAMPBELL, *Judge*.

Among the proceedings had on this day is the following:

Decree.

On the 23rd day of June, 1916, this cause came on to be heard in open court at the City of Muskogee, in the State of Oklahoma, plaintiffs appeared by their attorneys, N. A. Gibson, C. O. Blake, Joseph G. Gamble and K. W. Shartel, and the defendants, B. W. Mackey, as County Treasurer of Hughes County, Oklahoma; the City of Holdenville, a municipal corporation; Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, partners in trade, doing business under and in the name of Spitzer, Rorick & Company; and

Madison G. Baldwin, appeared by attorneys, Furry & Motter, and announced ready for trial, and the court proceeded to hear the evidence and arguments of counsel, and thereupon, with the consent of all parties plaintiff and defendant, held the said cause for further consideration and decision.

And now on this day of January, 1918, the court, having considered the evidence and arguments of counsel and reached a decision in the said cause, announces and submits to counsel for plaintiffs and defendants its written opinion therein as follows, to-wit:

“CAMPBELL, D. J.:

“This case, submitted and briefed some time ago, I have only recently had the time and opportunity to fully consider. After a careful study of the record and a consideration of the arguments, oral and by way of briefs, I conclude that the plaintiffs are entitled to the relief prayed. Under the provisions of the several Acts of Congress constituting the grant of right of way, the railroad company has a mere right of occupancy or easement for railroad purpose, the fee to the land still remaining in the Indian tribes, and subject to revert to them in case of discontinuance of the use. The coal lands, the developments of which was one of the chief objects of this grant of right of way originally, still belong to the Choctaw and Chickasaw tribes, and those tribes are still in existence, as is also the Creek tribe which owns the lands involved as a part of the right of way in this controversy. These coal lands are now being operated under leases made by the tribes under governmental supervision. The railroad company has not been relieved of any of the obligations it assumed with the grant, either as relate to the United States or to the Indian tribes. Whatever may be the power of the state or a subordinate municipality to impose a general tax upon the railway, to enforce the payment of which a lien may be imposed upon its property and franchise, I do not believe that the City of Holdenville was empowered under the paving statutes relied upon to impose upon the portion of the right of way abutting upon Oklahoma Avenue the special paving assessment it seeks to enforce. By the terms of the Enabling Act the state (and consequently all its subordinate divisions or municipalities) is without power to limit or impair the rights of persons or property pertaining to the Indians, so long as such rights shall remain unextinguished, or to limit or affect the authority of the government of the United States to make any law of regula-

tion respecting such Indians, their lands, property or other rights; and that has been held to prohibit the state from passing any act to limit or affect any law or regulation in existence when the Enabling Act was passed. To construe the paving statute relied upon by defendants as empowering the City of Holdenville to subject this portion of the right of way, the title to which, subject to the railroad use or easement, is in the Creek tribe, to forced sale to satisfy a lien for this special paving improvement, would certainly be contrary to the spirit of the Enabling Act, and would put it within the power of the municipality to subvert the governmental plan by which these coal mines are being operated and the coal therefrom carried to market, in that to permit the sale of a segregated segment of the right of way, however, small, of necessity destroys the efficacy of the railroad, the agency through which Congress intended to carry out its purposes. At any rate these considerations afford grave doubt of the city's power to subject this property to the paving lien, which doubt must therefore be resolved against the power. *M., K. & T. R. Co. v. City of Tulsa*, 145 Pac. 400.

"Plaintiff's counsel may draft decree, presenting the same to defendant's counsel for O. K. as to form, and, if so approved, may then be presented for the court's signing and entry. If counsel disagree as to the form of the decree, the court on application will set a day certain for presentation of the matter."

And now the court, being sufficiently advised in the premises and in accordance with said opinion, does find for the plaintiffs, that the plaintiffs are entitled to the free use and possession of the property and premises described in their Bill of Complaint herein, to-wit: the right of way and station grounds of the said plaintiffs at Holdenville, Oklahoma, for railway purposes, and their title thereto and therefor should be and is confirmed, and the pretended assessment described in said Bill of Particulars is found, adjudged and decreed to be void and of no effect as against them; and the said defendants, B. W. Mackey, as County Treasurer of Hughes County, Oklahoma; the City of Holdenville, a municipal corporation; Ceilan M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B. Spitzer, partners in trade, doing business under and in the name of Spitzer, Rorick & Company; and Madison G. Baldwin, and each of them, and the representatives, successors in interest and in office of each and all of said defendants, their agents, and all persons acting for, through, by or under them, or either of them, or by

their authority, be and are enjoined and commanded to refrain from in any manner setting up or asserting as against the said plaintiffs, or either of them, or the successor or successors or assigns of the said plaintiffs, or either of them, any right, interest or authority in or pertaining to the said described premises by virtue of the pretended assessment set out in said Bill of Complaint and from taking any action to enforce the payment of the said assessment or any installment or part thereof, or interest or penalties thereon.

That plaintiffs have and recover of the defendants above-named their costs herein, taxed at and found to be the sum of

.....

And hereof let process issue.

To all of which findings, conclusions and decree, the said defendants, and each of them, at the time excepted and now except.

RALPH E. CAMPBELL, *District Judge.*

O.K. as to form:

C. O. BLAKE, *Atty. for Plaintiff;*

FURRY & MOTTER, *Attys. for Defendants.*

Endorsed: Filed Feb. 7, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 1st day of June, A. D. 1918, the defendants filed their Petition for Allowance of Appeal, together with their Assignments of Errors, which appeal was allowed by the Court. Said Petition for Allowance of Appeal, Assignment of Errors and Order Allowing Appeal are in words and figures as follows:

Petition for Allowance of Appeal.

To the Honorable RALPH E. CAMPBELL, Judge of the Above Named Court:

The above named defendants feeling themselves aggrieved by the decree made and entered in this cause on the 7th day of February, 1918, do hereby in open Court appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and pray that their appeal be allowed, and that the transcript of the record, proceedings and papers on which said decree and order were based, duly authenticated, may be sent to the United States

Circuit Court of Appeals for the Eighth Circuit, and that an order be made fixing the amount of securing which defendants shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Eighth Circuit.

J. B. FURRY,

E. C. MOTTER,

Attorneys for defendants.

The above and foregoing petition for appeal is granted and the appeal therein prayed for to the United States Circuit Court of Appeals for the Eighth Circuit is this day allowed in open Court, and ordered that the bond on appeal be and is hereby fixed at the sum of \$250.00, the same to act as a cost bond for costs and damages on appeal.

Done this 1st day of June, 1918.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Jun. 1, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Assignments of Error.

Come now the defendants in the above entitled cause by their attorneys of record, and file herein the following assignments of error upon which they will rely as grounds of reversal in their appeal from the orders and decree of this Court entered herein on the 7th day of February, 1918.

First.

The Court erred in finding for the plaintiffs and against the defendants on the issues in said cause.

Second.

The Court erred in holding that the assessments described in plaintiffs' Bill of Particulars, which had been levied and assessed by The City of Holdenville against the property of the plaintiffs, are void and of no effect as to the plaintiffs.

Third.

The Court erred in holding that the defendant, The City of Holdenville, was not empowered under the laws of Okla-

homa relating to the improvement of streets, relied upon by the defendants in this case, to impose upon the portion of the right-of-way and station grounds adjacent to or abutting upon Oklahoma Avenue the special paving assessments for the improvement of Oklahoma Avenue.

Fourth.

The Court erred in holding that the interest, right, title or easement of the plaintiffs in and to the right-of-way and station grounds in the City of Holdenville was not subject to assessments for the improvement of Oklahoma Avenue running parallel and adjacent to said right-of-way and station grounds.

Fifth.

The Court erred in holding that by reason of plaintiffs being a federal agency and being used as an instrument by the government in developing the coal lands of the Indian Tribes, and engaged in interstate commerce, the right, title and interest of the plaintiffs in the right-of-way and station grounds at Holdenville, adjacent to Oklahoma Avenue, were not subject to special assessments for the improvement of Oklahoma Avenue.

Sixth.

The Court erred in not finding and holding that the plaintiffs under the admitted and undisputed facts in this case were guilty of such laches as to now estop plaintiffs from questioning the validity of the assessments levied on plaintiffs' property by the City of Holdenville for the improvement of Oklahoma Avenue.

Seventh.

The Court erred in failing to find and hold that the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners doing business as Spitzer, Rorick & Company, and Madison G. Baldwin, are innocent purchasers for value of the bonds issued by The City of Holdenville for the improvement of Oklahoma Avenue, and that the plaintiffs are estopped as against said bondholders from questioning the validity of the assessments levied for the purpose of paying said bonds.

Eighth.

The Court erred in not holding that the cause of action of the plaintiffs against the defendants, if any cause of action plaintiffs ever had in the premises, was barred by the statute of limitations, as contained in the stipulations filed

herein and in the statutes of Oklahoma relating to the improvement of streets.

Wherefore, these defendants pray that said decree be reversed and that the Circuit Court of Appeals for the Eighth Circuit render a decree and final judgment dismissing plaintiffs' bill.

J. B. FURRY.

E. C. MOTTER,

Attorneys for defendants.

Endorsed: Filed Jun. 1, 1918, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

Bond on Appeal.

Know All Men by These Presents:

That we, B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, The City of Holdenville, a municipal corporation, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners as Spitzer, Rorick & Company, and Madison G. Baldwin, as principals, and American Bonding and Casualty Company, Sioux City, Iowa, as surety, are held and firmly bound unto the Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company, in the full and just sum of Two Hundred & Fifty (\$250.00) Dollars, to be paid to the said Choctaw, Oklahoma & Gulf Railroad Company, and The Chicago, Rock Island & Pacific Railway Company, their successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of June, 1918.

Whereas, at the January 1918 term of the District Court of the United States for the Eastern District of Oklahoma, in a suit pending in said Court between The Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company, plaintiffs, and B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, The City of Holdenville, a municipal corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners doing business as Spitzer, Rorick & Company, and Madison G. Baldwin, defendants, a decree was rendered against said defendants, and the said defendants have obtained an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse said decree in the aforesaid suit and a cita-

tion directed to the said Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Paul, Minnesota, sixty (60) days from and after the date of said citation;

Now the condition of the above obligation is such that if the said appellants shall prosecute said appeal to effect and answer to all damages and costs, if they fail to make good their plea the above obligation to be void; otherwise to be and remain in full force and effect.

B. W. MACKEY,

as County Treasurer of
Hughes County, Okla.

THE CITY OF HOLDENVILLE,

MADISON G. BALDWIN,

SPITZER, RORICK & COMPANY,

By J. B. FURRY, their Attorney,

Principals.

AMERICAN BONDING AND CASUALTY COMPANY,

(Seal)

By W. F. MOFFATT, Attorney-in-fact.

Surety.

The above bond approved this June 1, 1918.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Jun. 1, 1918, R. P. HARRISON, Clerk U. S. District Court, Eastern District of Oklahoma.

Citation.

The United States of America to the Choctaw, Oklahoma & Gulf Railroad Company, a Corporation, and to the Chicago, Rock Island & Pacific Railway Company, a Corporation, Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty (60) days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office in the District Court of the United States for the Eastern District of Oklahoma, wherein B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, The City of Holdenville, a municipal corporation, and Horton C. Rorick, Adelbert

L. Spitzer and Carl B. Spitzer, partners in trade, doing business under the firm name and style of Spitzer, Rorick & Company, and Madison G. Baldwin, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable RALPH E. CAMPBELL, Judge of the District Court of the United States for the Eastern District of Oklahoma, this 1st day of June, A. D. 1918.

RALPH E. CAMPBELL,
*Judge of the United States District Court
for the Eastern District of Oklahoma.*

Service of the within and foregoing citation acknowledged and accepted this 3 day of June, A. D. 1918.

The Choctaw, Oklahoma & Gulf Railroad Company, & The Chicago, Rock Island & Pacific Railway Company,
Appellees,

By C. O. BLAKE,
N. A. GIBSON,
Their Attorneys.

Endorsed: Filed Jun. 24, 1918, R. P. Harrison, Clerk
U. S. District Court, Eastern District of Oklahoma.

Praecipe and Election as to Printing Record.

To the Honorable R. P. Harrison, Clerk of the Above-named Court:

B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, The City of Holdenville, a municipal corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners in trade, doing business under the firm name and style of Spitzer, Rorick & Company, and Madison G. Baldwin, appellants herein, hereby elect to have the transcript of the record in the above entitled cause printed under the supervision of the Clerk of the United States District Court for the Eastern District of Oklahoma, and respectfully request that said transcript in this cause be printed as required by law, under this election, and you are requested to make a transcript of the record in the above entitled cause to be printed under the supervision of the Clerk of the United

States District Court of Muskogee, Oklahoma, and filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to an appeal allowed in this cause, and to include in said transcript of record the following and no other papers or exhibits:

1. Bill of Complaint filed November 1, 1912.
2. Answer of defendants, B. W. Mackey, County Treasurer, et al., filed March 3, 1913.
3. Answer of defendants, Horton C. Rorick, et al., filed March 3, 1913.
4. Stipulation filed April 26, 1916, also called "Agreed Statement of Facts," and exhibits thereto attached, except Exhibit "A".
5. Statement of evidence admitted and offered at the final trial of said cause on June 22, 1916.
6. Final decree signed and entered February 7, 1918.
7. Petition for appeal, and order allowing same.
8. Assignment of errors.
9. Appeal bond and approval of same.
10. Citation and acceptance of service thereof.
11. Praecipe and election for printing record.
12. Acceptance of service of praecipe and election for printing record.

J. B. FURRY,

E. C. MOTTER,

Attorneys for B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, The City of Holdenville, a municipal corporation, and Horton C. Rorick, Ad-elbert L. Spitzer and Carl B. Spitzer, partners in trade doing business under the firm name and style of Spitzer, Rorick & Company, and Madison G. Baldwin, Appellants.

We, the undersigned attorneys for Choctaw, Oklahoma and Gulf Railroad Company, and the Chicago, Rock Island and Pacific Railway Company, hereby acknowledge receipt of the above designation of the parts of the record necessary for the consideration of the errors assigned by defendants and appellants in the above entitled cause, and waive the designation of any further part or parts of the record and agree that the above includes all the portions of such record material

or necessary for the consideration of the errors assigned by said defendants and appellants, and hereby accept service of the same and service of the above election as to printing the record.

Dated this 21 day of June, 1918.

C. O. BLAKE,

.....
Attorneys for Plaintiffs.

Clerk's Certificate.

United States of America, Eastern District of Oklahoma—ss.

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of *Choctaw, Oklahoma & Gulf Railroad Co., et al., v. B. W. Mackey, et al.*, Eq. No. 1913, as was ordered by praecipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the citation attached hereto and returned herewith is the original citation issued in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Muskogee, dated this 16th day of July, A. D. 1918.

R. P. HARRISON, *Clerk*,

(Seal)

By H. E. BOUDINOT, *Deputy*.

And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Messrs. Furry & Motter as Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5215.

B. W. MACKEY, as County Treasurer of Hughes County, Oklahoma,
et al., Appellants,

VS.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

J. B. FURRY,
E. C. MOTTER,
Muskogee, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 25, 1918.

(Appearance of Mr. James W. Harbaugh as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

JAMES W. HARBAUGH,
216 Nicholas Bldg., Toledo, Ohio.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 21, 1919.

(Appearance of Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

C. O. BLAKE,
R. J. ROBERTS,
W. H. MOORE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 31, 1918.

(Order of Submission.)

December Term, 1918.

Friday, January 10, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. B. Furry for appellants, continued by Mr. C. O. Blake for appellees and concluded by Mr. J. B. Furry for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1919.

No. 5215.

B. W. MACKEY, as County Treasurer of Hughes County, Oklahoma; The City of Holdenville, a Municipal Corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, Partners in Trade, Doing Business under the Firm Name and Style of Spitzer, Rorick & Company, and Madison G. Baldwin, Appellants,

vs.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, a Corporation, and The Chicago, Rock Island & Pacific Railway Company, Appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. J. B. Furry (Mr. E. C. Motter was with him on the brief), for appellants.

Mr. C. O. Blake (Mr. R. J. Roberts and Mr. John E. Du Mars were with him on the brief), for appellees.

Before Hook and Carland, Circuit Judges, and Amidon, District Judge.

Hook, *Circuit Judge*, delivered the opinion of the Court.

This is an appeal from a decree in a suit by the railroad companies enjoining the City of Holdenville, Oklahoma, and the county treasurer from enforcing special assessments against the railroad right of way and station grounds for the improvement of Oklahoma Avenue upon which the right of way and grounds abut. The railroad companies claim the assessments are invalid because (1) of the peculiar character of their interest in the property and of the reversionary estate, and (2) there was not a sufficient identification of the property in the proceedings of the mayor and city council. The first of these contentions assumed three phases. It was urged that the reversionary estate was in the Creek Nation of Indians and held in trust for them by the United States; that the congressional grant of the easement for railroad purposes charged the railroads with certain continuous public duties and services which would be defeated or impaired by the enforcement of the assessments in question, and that the laws of the State of Oklahoma gave no authority to impose

such charges on railroad rights of way. The trial court granted the injunction because of the Indian character of the reversionary estate and the particular purposes for which Congress granted the railroad easement.

The town, now city, of Holdenville was established, surveyed and platted into lots, blocks, streets and alleys under the direction of the Secretary of the Interior and according to the provisions of the Original Creek Agreement. The lands included were exempted from allotment. The railroad right of way through the town, with enlarged width for station grounds, comprised a tract 300 feet wide and 3000 feet long. It was embraced within the corporate limits of the town and was flanked on both sides by public streets, Oklahoma Avenue, improved as above stated, being one of them. Other platted streets touched the grounds at right angles on both sides. In time, passenger and freight stations, elevators, warehouses, etc., were built on the grounds, and access to them necessarily required the constant use of the contiguous streets. The easement of the Choctaw, Oklahoma & Gulf Railroad Company, one of the plaintiffs, was granted in perpetuity, and with the consent of Congress it leased its railroad and appurtenances, including the grounds in question here, to its co-plaintiff, the Chicago, Rock Island & Pacific Railway Company, for 999 years. The latter company is operating the leased railroad as one of the main lines of its interstate system. We think the case should be regarded as though the right of way and grounds were of the customary character unaffected by the Indian reversion. The estate of the Indians is too remote for practical consideration, and if the assent of the Government as trustee or guardian that the property should bear burdens as similar railroad property elsewhere were necessary it might reasonably be inferred from the circumstances above recited. The special assessments in question are not occupation taxes nor imposed upon the operations of the railroad companies as governmental agencies and have no close touch or relation to the Indian interest as was the case in *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292. The special assessments are against the railroad property which for tax purposes may be regarded as wholly owned by the companies. It is suggested that the enforcement of the assessments might disable them from performing their duties to the Government and the Indians. But if it is their duty to pay and to save the property from tax sale and dismemberment they can not well plead their own default. It is settled that a railroad right of way is subject to general taxation, even one granted by Congress over an Indian reservation, *Maricopa & Phoenix R. Co. v. Arizona Territory*, 156 U. S. 347, and there is no such difference in principle between a general tax and a special assessment which proceeds on the theory of a direct and special benefit, that makes for a different conclusion. The general rule, sustained by the weight of authority, is that a railroad right of way, whether owned in fee or held in easement, is real estate, property or ground which may be subjected to assessment for the cost of local improvements. See *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned

in 197 U. S. 430; *Dillon on Munic. Corp.* sec. 1451, (5th Ed. p. 2586). We think that is also the rule in Oklahoma. See *M. K. & T. Ry. Co. v. City of Tulsa*, 45 Okla. 382, 145 Pac. 398, involving a right of way owned in fee but not otherwise different from the one here; also *Oklahoma Railway Co. v. Severns Paving Co.*, — Okla., —, 170 Pac., 216, and *Oklahoma City v. Orthwein*, — C. C. A. —, 258 Fed., 190, recently decided by this court.

Was there a sufficient identification of the property? A state law provides: "If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment, as herein provided." That was done. The city engineer prepared and submitted to the city council a map in which the railroad right of way and station grounds were divided into quarter block areas by projecting the lines of contiguous streets and block boundaries, and designated them by arbitrary numbers. The map was duly adopted by that body and the designations of the quarter blocks were afterwards followed in making the assessments. The temporary absence of the map from the office of the city clerk did not invalidate that step in the proceedings. The agents of the plaintiffs were fully advised of what was being done and of the progress of the improvement. No question was raised until after the work was complete. The map was inadvertently sent to the bond purchasers but the plaintiffs were not misled or prejudiced.

The decree is reversed and the cause is remanded with direction to dismiss the bill.

Filed October 14, 1919.

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1919, Monday, October 20, 1919.

No. 5215.

B. W. MACKEY, as County Treasurer of Hughes County, Oklahoma; The City of Holdenville, a Municipal Corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, Partners in Trade, Doing Business under the Firm Name and Style of Spitzer, Rorick and Company, and Madison G. Baldwin, Appellants,

vs.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, a Corporation, and The Chicago, Rock Island and Pacific Railway Company.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that B. W. Mackey, as County Treasurer of Hughes County, Oklahoma. The City of Holdenville, a municipal corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners in trade, doing business under the firm name and style of Spitzer, Rorick and Company, and Madison G. Baldwin, have and recover against The Choctaw, Oklahoma and Gulf Railroad Company, a corporation, and The Chicago, Rock Island and Pacific Railway Company, the sum of — Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the bill of complaint.

October 20, 1919.

(Petition for Appeal to Supreme Court, U. S.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 20th day of October, 1919, do hereby appeal from said

decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed; that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at Washington, in the District of Columbia, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

C. O. BLAKE,

R. J. ROBERTS,

Attorneys for Appellants, Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Ry. Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 9, 1919.

(Assignment of Errors on Appeal to Supreme Court, U. S.)

Come now the Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company, appellees in the above entitled cause, and file the following assignment of errors upon which they will rely upon their appeal therein from the decree made by this honorable court on the 20th day of October, 1919.

I.

The Circuit Court of Appeals for the Eighth Circuit had no jurisdiction to render and enter the said decree.

II.

The Circuit Court of Appeals erred in holding that the tract or parcel of complainants' right of way and station grounds described in the bill of complaint, or petition, was not, under the Constitution and laws of the United States, exempt from the pretended assessment and from segregation and sale thereunder separate from the railway franchise.

III.

The Circuit Court of Appeals erred in holding that the complainants' easement of right of way and station grounds, sought to be assessed and sold, was sufficiently identified in the proceedings therefor to afford due process of law, and that the enforcement of the pretended assessment was not, for that reason, repugnant to the Fourteenth Amendment to the Constitution of the United States.

IV.

The Circuit Court of Appeals erred in holding that the State laws, authorizing assessment for local improvements and sale for nonpayment, authorized special assessment against and the sale of the easement of right of way and station grounds described in the bill of complaint.

Wherefore, the Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company, jointly and severally, pray that said decree be reversed and that the Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree in accordance with the decision of the Supreme Court of the United States.

C. O. BLAKE,
R. J. ROBERTS,

Attorneys for Appellants, Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 9, 1919.

(Order Allowing Appeal to Supreme Court, U. S., and Fixing Amount of Bond, etc.)

On motion of C. O. Blake, Esq., solicitor and counsel for the Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company, the appellees in the above entitled cause, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, conditioned upon the filing of a bond as hereinafter provided, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed in the sum of \$500.00, as a bond for costs on appeal, the same to be approved and filed within fifteen days from this date.

Dated this 9th day of December, 1919.

WILLIAM C. HOOK,
United States Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 9, 1919.

(Bond on Appeal to Supreme Court, U. S.)

Know all men by these presents, that we, the Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company, as principals, and the American Surety

Company of New York, as surety, are held and firmly bound unto B. W. Mackey, as County Treasurer of Hughes County, Oklahoma; the City of Holdenville, a municipal corporation; Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners in trade, doing business under the firm name and style of Spitzer, Rorick & Company, and Madison G. Baldwin, in the sum of five hundred dollars (\$500.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 16th day of December, 1919.

Whereas the above-named Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,

Principals,

By C. O. BLAKE,

Their Attorney.

AMERICAN SURETY COMPANY OF
NEW YORK,

Surety.

By KENNETH C. QUAY,

Resident Vice President.

[Seal of American Surety Co.]

Attest:

E. HASSELL,

Resident Assistant Secretary.

230,081 A.

The within bond is approved both as to sufficiency and form this 22nd day of December, 1919.

WALTER H. SANBORN,

United States Circuit Judge.

(Powers of Attorney attached to Original Bond).

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 22, 1919.

In the United States Circuit Court of Appeals for the Eighth Circuit,

No. 5215. In Equity.

B. W. MACKEY, as County Treasurer of Hughes County, Oklahoma; The City of Holdenville, a Municipal Corporation, and Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, Partners in Trade, Doing Business under the Firm Name and Style of Spitzer, Rorick & Company, and Madison G. Baldwin, Appellants,

VS.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, a Corporation, and The Chicago, Rock Island and Pacific Railway Company, Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To B. W. Mackey, as County Treasurer of Hughes County, Oklahoma; the City of Holdenville, a municipal corporation; Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, partners in trade, doing business under the firm name and style of Spitzer, Rorick & Company; and Madison G. Baldwin, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from and after this date, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the Circuit Court of Appeals for the Eighth Circuit from a final decree signed, filed and entered on the 20th day of October, 1919, in that certain suit in the said Circuit Court of Appeals, appealed from the District Court of the United States for the Eastern District of Oklahoma, being No. 5215, in Equity, wherein you were appellants and the Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company were appellees, to show cause, if any there be, why the decree rendered against the said Choctaw, Oklahoma and Gulf Railroad Company and The Chicago, Rock Island and Pacific Railway Company, mentioned in the said order allowing appeal, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable William C. Hook, United States Circuit Judge for the Eighth Circuit, this 9th day of December, A. D., 1919.

WILLIAM C. HOOK,

United States Circuit Judge.

Service of the foregoing citation on appeal is hereby acknowledged to have been made upon us this 16th day of December, 1919.

J. B. FURRY,

E. C. MOTTER,

*Attorneys for Appellant, B. W. Mackey,
as County Treasurer, etc., et al.*

[Endorsed:] No. 5215 in Eq. Circuit Court of Appeals, Eighth Circuit. B. W. Mackey, et al., Appellants, vs. Choctaw, Oklahoma & Gulf Railroad Company, et al., Appellees. Citation on Appeal to Supreme Court, U. S. Filed Dec. 20, 1919. E. E. Koch, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, et al., were Appellants, and The Choctaw, Oklahoma & Gulf Railroad Company, et al., were Appellees, No. 5215, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of December, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 27,404. U. S. Circuit Court Appeals, 8th Circuit. Term No. 649. The Choctaw, Oklahoma & Gulf Railroad Company and The Chicago, Rock Island & Pacific Railway Company, appellants, vs. B. W. Mackey, as County Treasurer of Hughes County, Oklahoma; The City of Holdenville et al. Filed December 29th, 1919. File No. 27,404.

(734)

JAN 13 1921

JAMES D. MAHER,
CLERK.

In the Supreme Court of the
United States

OCTOBER TERM, 1920.

No. 211.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD
COMPANY AND THE CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY,
Appellants,

VS.

B. W. MACKEY, AS COUNTY TREASURER OF HUGHES
COUNTY, OKLAHOMA; THE CITY OF HOLDEN-
VILLE, ET AL., *Appellees.*

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 211.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD
COMPANY AND THE CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY,
Appellants,

vs.

B. W. MACKEY, AS COUNTY TREASURER OF HUGHES
COUNTY, OKLAHOMA; THE CITY OF HOLDEN-
VILLE, ET AL., *Appellees.*

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

(Figures in parentheses refer to pages of the printed record.)

This is an appeal from a decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the judgment of the District Court for the Eastern District of Oklahoma setting aside what appellants insist is a pretended assessment for street improvements against the right of way and station grounds of the appellants in Oklahoma.

Appellants seek to present for decision three questions decided by the Circuit Court of Appeals, viz:

I.

Is the state statute, as asserted and applied by the State and as construed by the Circuit Court of Appeals for the Eighth Circuit, repugnant to Section 8 of Article 1 of the Constitution of the United States?

II.

Were the proceedings to make and enforce the assessment such as to afford due process of law?

III.

Did the state laws authorize the assessment?

ABSTRACT OF RECORD.

We will attempt to briefly state only so much of the facts as will enable the court to consider these questions.

The suit was heard in the District Court of the Eastern District of Oklahoma on an agreed statement of facts (68-98) supplemented by certain oral testimony (98-109).

By congressional enactments and by the answers and agreed statement of facts, it is made to appear that by an Act of Congress approved February 18, 1888, 25 U. S. Stat. at L. Chap. 13, page 35, the Choctaw Coal and Railway Company (which we will hereinafter call the Coal Company) was authorized to construct and maintain a railway line through what was then Indian Territory to the leased coal veins of that company in the Choctaw Nation in said territory, and thence to an intersection with The Atchison, Topeka and Santa Fe Railway Company.

The Coal Company (3) had been incorporated under the laws of Minnesota, and empowered, among other things, to mine, sell, market and deal in coal, iron and other ores and the products thereof; to manufacture coke, charcoal, pig iron and various other metals; to buy, lease, deal in and work mineral lands, and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or development of any mine or quarry owned or operated by it.

By the second section of said act, it is provided:

"That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land 200 feet in width, with a length of 3,000 feet, in addition to right of way, for stations, for every ten

miles of road, * * * *Provided*, That no more than said addition of land shall be taken for any one station: *Provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."

Succeeding sections made provision for compensation to individual occupants and to the nation or tribes, and Section 4 (25 Stat. 37) provided that "said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

Section 13 (25 Stat. 39) provided that the right of way granted should not be assigned or transferred in any form whatever prior to the construction and completion of the road, except as to mortgages or other liens that might be given or secured thereon to aid in the construction.

It was stipulated (78) that the right of way and station grounds sought to be charged with the assessment in question are a part of the lands granted by the Congress of the United States for the purposes and as alleged in the bill of complaint, and, together with the said tracks and facilities located thereon, were at the time of the proceedings by the City Council, and for a long time theretofore and ever since had been, used as

a part of the railway in the conduct of business as a common carrier, both interstate and intrastate, and that a portion of the main track of the railway is upon the tract sought to be subjected to the payment of the assessments involved.

It was alleged in the bill (4), and also disclosed by a public act approved August 24, 1894, 28th U. S. Stat. at L., Chap. 330, page 502, that the Coal Company proceeded to develop the coal mines upon the leases aforesaid and to construct the railway line for the transportation of the products of the said mines, and in the prosecution of the said work became insolvent, and the Congress empowered the purchasers of the rights of way, railroads, mines, coal leasehold estates, and other property, and the franchises of the Coal Company, at any sale made thereunder or pursuant to any decree of court, to form a corporation, and vested in such corporation all the right, title, interest, property, possession, claim and demand in and to such rights of way, railroads and franchises (34) pursuant to said act, and there was organized the complaining corporation, the Choctaw Oklahoma & Gulf Railroad Company, which we will hereinafter call the Choctaw Company. Section 4 of that act authorized the corporation so formed to lease its railroads, mines and other property to any company owning or operating a railroad connecting with the railroad of the new corporation. The Choctaw Company purchased all the right, title, interest, property, possession, etc. of the Coal Company, and proceed with the construction of the railway and operation of the mines. The Choctaw Company, successor, filed maps in accordance with the provisions of the act empowering it to select and use the ground for right

of way and station purposes (6-7), and the premises sought to be assessed were a part of the grounds so selected and used.

On March 24, 1904, the Choctaw Company, under authority of Section 4 of the Act of 1894, 28th Stat., p. 502, leased its lines of railway, including the right of way and station grounds involved, to The Chicago, Rock Island and Pacific Railway Company, its co-plaintiff and appellant, which we will hereinafter call the Rock Island Company (7). The two companies constructed (8) and, at the time of the proceedings, maintained upon the right of way and station grounds described, railway tracks, station houses, freight depots and other necessary appurtenances, which were in constant use in the performance of their charter powers, and said right of way and station grounds abutted upon Oklahoma Avenue, a thoroughfare of the defendant, the City of Holdenville.

It was stipulated (69) that the City of Holdenville was incorporated on the 14th day of November, 1898, and included the premises so used by the appellants as right of way and station grounds; that the city site was platted under direction of the Secretary of the Interior (70), and the tract of land 300 feet in width and 3,000 feet in length, described in the bill of complaint, and constituting the right of way and station grounds, was a part of the territory within the corporate limits of the town of Holdenville, as defined.

It was also stipulated (par. 6, p. 71) that the portion of said right of way and station grounds abutting on Oklahoma Avenue within the length of 1461 feet had constructed thereon complainants' main and side tracks,

passing tracks, house tracks, passenger and freight depots, express office, cotton platform, grain elevators and storage houses, all of which were in use, and all of which, except the passing track, were located on the portion of such right of way and station grounds north-east of the center line thereof. A plat was agreed to as Exhibit "B" and is found in the transcript (79) and discloses that the right of way and station grounds run in a northwesterly and southeasterly direction.

The assessment proceedings were under the provisions of the Session Laws of Oklahoma of 1907-8, page 166, and the amendment of 1909, Session Laws of 1909, page 131. The amendment provides:

"Section, 1. That section 3 of chapter 10 of the Session Laws of 1907-1908 shall hereafter read as follows: *Section 3.* The lots, pieces or parcels of land fronting and abutting upon any such improvement shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided. Provided, that in case of any alley extending through a block which shall not be in the center of the block, then

assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or tracts are to be assessed for any such improvements, any part of the cost of such improvement in excess of the benefits accruing to lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; provided further, that the mayor and council may, in their discretion provide for the payment of the cost of improving street intersections and alley crossings, which cost shall be provided for and paid by said city, and for the purpose of paying such expense a special and separate levy shall be made and entered against all the property of the said city at the next annual tax levy, after such estimate is made which said expense shall embrace the *pro rata* part of the expenses of advertising and making profiles and specifications together with the expense charged by the city engineer, superintendent, and in all other respects, but the city may at its option, arrange for its payment in three annual payments, and the board of appraisers appointed for ascertaining and assessing such cost shall apportion in their assessment a portion of such expense as may be charged to the street or steam railway companies, or either of them, and to the city. If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisal and assessment, as herein provided. Provided that whenever the petition provided for in section 2 of this act is presented, or when the mayor and city council shall have determined to pave or improve any street, avenue, lane, alley, or other public place, and shall have passed the resolution provided for in section 2 of this act—that the Mayor and Council shall then have the power to enact all

ordinances and to establish all such rules and regulations as may be necessary to require the owners of all property subject to assessment to pay the cost of such improvement, to cause to be put in and constructed all water, gas or sewer pipe connections, to connect with any existing water, gas or sewer pipes in and underneath the streets, avenues, lanes, and alleys and other public places where such public improvements are to be made, and all costs and expenses for making such connections shall be taxed against such property and shall be included and made a part of the general assessment to cover the cost of such improvement."

It will be noted that the quoted section contains the provision, that "if any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided." It was under this paragraph that the property of complainants was sought to be charged. Inasmuch as such right of way and station grounds had not been platted into lots and blocks, the Mayor and Council of the city, on June 29, 1910, by motion, adopted a map, which is shown by Exhibit "C" (79). The minutes of the meeting of the Council show (72) that:

"City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes."—

and that a motion to adopt was carried.

It was stipulated: (73).

"That on the original of said map the lines,

showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$, $78\frac{1}{2}$, and the dollar signs followed by figures appearing therein, are in pencil, and attached thereto are certain affidavits and endorsements, copies of which are attached to said exhibit; that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the city of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of subdividing said right of way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements.

"10. Inasmuch as said Oklahoma Avenue extends in a southeasterly and northwesterly direction along the front of said blocks $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$, and the exterior lines of said quarter-block districts as shown by said map are on two of the opposite sides thereof parallel to said Oklahoma Avenue, and on the other two opposite sides thereof are at right angles to said Oklahoma Avenue, such quarter-block districts were, under said appraisalment and apportionment, and in the said ordinance levying said assessments, described with reference to the cardinal points of the compass, that is to say, the most northerly quarter-block of each of said blocks was given the designation of 'North $\frac{1}{4}$ Block of Block --' (the number being inserted), and the most easterly designation of 'East $\frac{1}{4}$ of Block of Block ----, (the number being inserted)."

After the adoption of the map (74), and the passage of an ordinance levying assessments, the original

map was included in a transcript of the proceedings of the Mayor and Council and delivered to the contractor performing the work and by him forwarded to the defendants Spitzer, Rorick & Company, of Toledo, Ohio, the purchasers of the bonds issued to secure funds for making the improvements, and they, between January 23, 1913, and March 7, 1913, returned the map to the City Clerk, and thereafter and after the commencement of this suit the Mayor and Council (74) adopted a resolution (79) directing the city clerk to endorse on said map the adoption of June 29, 1910, and that he procure a suitable map filing device, to be marked and known as the "Map Record," in which should be filed and securely fastened all official maps, etc. The precise date when this map came into the possession of Spitzer, Rorick & Company at Toledo, Ohio, is not discoverable, but it is made clear that it was in the possession of defendants Spitzer, Rorick & Company from a date closely following its adoption to a time later than January 23, 1913.

It was further stipulated (74) that there is no record or plat, except the plat, Exhibit "C", and the records of the proceedings of the mayor and council adopting such plat, which shows any subdivision of the right of way and station grounds into blocks numbered $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$, and that in all proceedings the property against and upon which an assessment is claimed was designated by such numbers, and not otherwise identified (20).

It was admitted in the answers (45) that the defendant B. W. Mackey, as county treasurer, intended to and did advertise that he would, on November 4, 1912,

make a sale of said quarter blocks for the amount of an installment, and interest, of the assessment so levied.

The selection and location of the right of way and station grounds is admitted in the answers of the defendants (34-50).

SPECIFICATIONS.

1. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the tract or parcel of complainants' right of way and station grounds, described in the bill of complaint, or petition, was not, under the Constitution and laws of the United States, exempt from its pretended assessment and from segregation and sale thereunder separate from the railway franchise.

2. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the complainants' easement of right of way and station grounds sought to be assessed and sold was sufficiently identified in the proceedings therefor to afford due process of law, and that the enforcement of the pretended assessment was not, for that reason, repugnant to the Fourteenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the state laws authorizing assessments for local improvement and sale for non-payment, authorize special assessments against, and the sale of, the easement of right of way and station grounds described in the bill of complaint.

ARGUMENT.

I.

Is the state statute, as asserted and applied by the State and as construed by the Circuit Court of Appeals for the Eighth Circuit, repugnant to Section 8 of Article 1 of the Constitution of the United States?

The Congressional Purpose.

There can be no question of the extent of the congressional power over the Indian lands and the railways, and under this first specification we shall discuss only the repugnancy of the State's conduct through its municipality and of the state law, as applied, to the acts of Congress.

It will be noted that the purpose of the acts of Congress was not alone to provide transportation, but that both acts of Congress have as their principal object the development of the coal lands belonging to the Indians, and to this end the purchasers of the property and franchises of the Coal Company were authorized to organize and become a federal corporation, with the rights, immunities, powers and duties of the Coal Company, which was primarily a mining company (25-26), with the power to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation of any mine or quarry owned or operated by the corporation. And it is the contention of these

appellants that by these acts of the Government, accepted by the companies, the premises sought to be charged with the assessment was impressed with a duty in relation to the congressional purpose, which would be obstructed by the sale apart from the franchise, of portions of the lands so devoted to such use. That the appellants were more than ordinary common carriers, and that they were charged and entrusted with a duty to accomplish the operation of the mines identified in the acts of Congress, and to transport the products thereof, as well as the United States mail.

The nature and purpose of such grants as those made to the Coal Company and to the Choctaw Company and of the estate thereby conferred have been definitely settled by this court. *C. St. P. M. & O. Ry. Co. v. United States*, 217 U. S. 180; *Spokane & B. C. Ry. Co. v. W. & G. N. Ry. Co.*, 219 U. S. 166; *Northern Pac. Ry. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044.

In the case last cited the court, speaking through Mr. Justice White, said:

“Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of re-

verter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land for the special purpose named, it is evident that, to give such efficiency to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 468, 23 L. Ed. 356, 361, 'a railroad company * * * is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchise granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern P. R. Co. v. Smith*, 171 U. S. 261, 275, 43 L. Ed. 158, 163, 18 Sup. Ct. Rep. 794, 799, speaking of the very grant under consideration: 'By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.

* * * * *

"To repeat, the right of way was given in order that the obligations of the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

We believe that this contention, that the way and grounds were not subject to the assessment is supported by the decision of this court in the case of *C. O. & G. R. R. Co. v. Harrison*, 235 U. S. 292. In that case, which arose over an attempt of the State of Oklahoma to place a gross production tax upon the products of the mines leased to the Coal Company and its successor, the Choctaw Company, the court said: that the act of Congress approved June 28, 1898, c. 517, 30 Stat. 495, 510—"Curtis Act," ratified, confirmed and put into effect the Atoka Agreement of April 23, 1897, between the United States and the Choctaws and Chickasaws, which provided that their coal lands should remain common property of the members of the tribes; that the revenues derived therefrom should be used for the education of their children; that the mines thereon should be under the supervision and control of two trustees appointed by the President and subject to rules prescribed by the Secretary of the Interior; that all such mines should be operated and royalties paid into the Treasury of the United States; that the royalty should be 15 cents per ton; empowered the Secretary of the Interior to reduce or advance the same according to the best interest of the tribes, and that all lessees should pay fixed sums as advance royalties. That in harmony with the provisions of the Curtis Act, the appellant secured leases of certain mines, obligating itself to take out annually specified amounts of coal, and to pay the stipulated royalty, and proceeded to develop the mines. The court, having recited the foregoing facts and others, said:

"From the foregoing it seems manifest that the agreement with the Indians imposed upon the Unit-

ed States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect."

It is true that the court was there speaking more with reference to the mining of the coal than the transportation thereof, but the mining and the transportation are inseparably connected and it was as much the duty of the Government to see that the avenues of transportation for which it, as guardian of the interest of the Indians, had appropriated a portion of their lands, were kept open and that the lands of the Indians which were taken for rights of way and station grounds were held intact, as it was to see that the coal mines were opened and operated.

UNITED STATES RULE OF PROPERTY.

At the time of the making of the grants to the Coal Company and its successor, the Choctaw Company, and of the authorization of the letting to the Rock Island Company, there was in effect in the United States a rule of property, arising out of the decision of this court in the case of *East Alabama R. Co. v. Doe, ex dem Visscher*, 114 U. S. 340, 29 L. Ed. 136, that no part of the right of way of a railway line may be sold under process separate from the franchise under which it is held. In that case the court said on page 140 of the Law Edition report:

"It would violate not only the expressed intention of the grantors in the deeds, but the manifest purpose of the Legislature of Alabama, to permit a private person to seize and appropriate the

right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent."

There are numerous state decisions to the contrary, but they are in the minority and do not relate to congressional grants. We think it but fair to assume that Congress, in granting the way and grounds, incorporated as integral parts thereof the rule of property so disclosed by the highest court and generally accepted in the courts of the land. We do not think that this court has since shown any disposition to change the rule so established.

In the case of *Nadeau et al. v. Union Pacific R. R. Co.*, 253 U. S. 442, this court said of a similar grant:

"In *Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, 596, lands in the Delaware Diminished Indian Reservation—east of the Pottawatomies—were declared 'public lands' within the intendment of the right of way clause, Act of 1862, although then actually occupied by individual members of the Tribe under assignments executed as provided by treaty. That case renders clear the definite purpose of Congress to treat Indian Reservations, subject to its control, as public lands within the right-of-way provision. This provision is not to be regarded as bestowing bounty on the railroad; it stands upon a somewhat different footing from private grants and should receive liberal construction favorable to the purposes in view. *United States v. Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 8, 14."

Campbell, D. J., in deciding this case in the District Court, said: (110.)

"Under the provisions of the several acts of

Congress constituting the grant of right of way, the railroad company has a mere right of occupancy or easement for railroad purpose, the fee to the land still remaining in the Indian tribes, and subject to revert to them in case of discontinuance of the use. The coal lands, the developments of which was one of the chief objects of this grant of right of way originally, still belong to the Choctaw and Chickasaw tribes, and those tribes are still in existence, as is also the Creek tribe which owns the lands involved as a part of the right of way in this controversy. These coal lands are now being operated under leases made by the tribes under governmental supervision. The railroad company has not been relieved of any of the obligations it assumed with the grant, either as relate to the United States or to the Indian tribes. Whatever may be the power of the state or a subordinate municipality to impose a general tax upon the railway, to enforce the payment of which a lien may be imposed upon its property and franchise, I do not believe that the City of Holdenville was empowered under the paving statutes relied upon to impose upon the portion of the right of way abutting upon Oklahoma Avenue the special paving assessment it seeks to enforce. By the terms of the Enabling Act the state (and consequently all its subordinate divisions or municipalities) is without power to limit or impair the rights of persons or property pertaining to the Indians, so long as such rights shall remain unextinguished, or to limit or affect the authority of the government of the United States to make any law of regulation respecting such Indians, their lands, property or other rights; and that has been held to prohibit the state from passing any act to limit or affect any law or regulation in existence when the Enabling Act was passed. To construe the paving statute relied upon by defendants as empowering the City

of Holdenville to subject this portion of the right of way, the title to which, subject to the railroad use or easement, is in the Creek tribe, to forced sale to satisfy a lien for this special paving improvement, would certainly be contrary to the spirit of the Enabling Act, and would put it within the power of the municipality to subvert the governmental plan by which these coal mines are being operated and the coal therefrom carried to market, in that to permit the sale of a segregated segment of the right of way, however small, of necessity destroys the efficacy of the railroad, the agency through which Congress intended to carry out its purposes. At any rate these considerations afford grave doubt of the city's power to subject this property to the paving lien, which doubt must therefore be resolved against the power. *M. K. & T. Ry. Co. v. City of Tulsa*, 145 Pac. 400.

In the case of *Commissioners of Buncombe County v. Tommey*, 115 U. S. 122, 29 L. Ed. 305, wherein was involved the construction of a statute creating a mechanic's lien, the court on page 307 of the Law Edition report, after holding that such lien did not exist as against the railway property, said:

"A different construction of the statute would enable parties having liens for amounts within the jurisdiction of justices of the peace, to destroy a public highway and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the Legislature, unless the words of the statute clearly require it be done."

We think that it may be said that no intention should be imputed to the National Congress to empower or suffer the state or its municipalities to dismember the thoroughfare so secured, either with or

without the consent of private investment therein. It was creating a public thoroughfare for all of the general uses and for a specific use to which a special interest of the government and of the Indian nations attached.

The grantee and its lessees and assigns, in fact all persons, were forbidden to use the granted ways and grounds for any other purposes, by the very clear language of Sec. 2, Chap. 13, 25th Stat. 36.

II.

Were the proceedings to make and enforce the assessment such as to afford due process of law?

It took years for appellants to discover that an assessment against their premises was claimed (98), and we think that it was void for uncertainty. A sufficient record of said inclusion proceedings was not made, and the record did not so identify the property sought to be charged as to constitute due process of law.

The provision under which the pretended assessment was made is Sec. 1, Art. 1 of Chap. 7 of the Session Laws of Oklahoma, 1909, which is found at page 7 of this brief. The provision for the assessment of unplatted property is found in the paragraph in the body of that section, and is as follows:

“If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisalment and assessment, as herein provided.”

Sec. 621 of the Rev. Laws of Oklahoma, 1910, purports to reproduce this provision, but the law was materially changed in that section, and the Revised Laws of 1910 were not adopted until March 3, 1911, to

“* * * take effect and be in force from and after the thirtieth day after the receipt, by the Secretary of State, of the supply of the Revised Laws of the State of Oklahoma, by this act adopted, in printed form, for the use of the State. Provided, that the Secretary of State shall first issue a proclamation published in some newspaper of general circulation, published at the state capital, fixing the date this act shall take effect.” (See preface to Vol. 1, Rev. Laws, 1910.)

The provision is vague. It is to be strictly construed, *M. K. & T. Ry. Co. v. City of Tulsa*, 45 Okla. 382, and strictly followed, *Morrow v. Barber Asphalt & Paving Co.*, 27 Okla. 247.

It will be noted that the provision is that “the mayor and council shall include such property in proper quarter block district for the purpose of appraisalment and assessment, as herein provided.” It does not authorize the platting of the property to conform to the existing plat as is provided in Sec. 621 of the Rev. Laws. Apparently, it was the contemplation of the law of 1909 that a quarter block district should be in existence at the time of the inclusion of the unplatted portion.

No authority to adopt a plat for unplatted property, nor to extend the plats already in existence, is found in the laws of Oklahoma prior to the adoption of the revision. This revision clearly contemplated the making of a plat and filing and recording it with the city clerk, a procedure, as to filing and recording, which the

municipality has apparently attempted to follow upon the return of the long lost plat and after the commencement of this suit (Exh. "D," 79).

The record contains between pages 78 and 79 a plat of the City of Holdenville as it existed at the time of the making of the pretended assessment. There is also in the transcript at the same place a copy of a map. It comes into the proceedings on the 29th day of June, 1910, (Stipulation, 72). It is there agreed that the mayor and council of the City of Holdenville, on June 29, 1910, by motion adopted a map, a copy of which is attached and marked Exhibit "C," and that the minutes of the city council with reference to said map, were as follows:

"City Engineer McIntosh presented a map showing the C. R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

"Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

"Upon a vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Cornish, Nix.

"Motion declared carried and map adopted."

On the return of the report of the appraisers (74, Sec. 15), showing an apportionment of benefits to the several lots and tracts of land mentioned and described in the report, including said "North $\frac{1}{4}$ block of Block 78 $\frac{1}{2}$, East $\frac{1}{4}$ block of Block 68 $\frac{1}{2}$, North $\frac{1}{4}$ block of

Block 68½, East ¼ block of Block 52½, North ¼ block of Block 52½, East ¼ block of Block 44½, North ¼ block of Block 44½, East ¼ block of Block 33½, North ¼ block of Block 33½." the municipal authorities appointed a time and place for holding a session to hear complaints or objections, and thereafter held such session on July 29, 1910, and by resolution confirmed the report of the appraisers and the apportionment as revised and corrected by them.

The map referred to, as shown by the parol evidence (104 and 105), was left in the custody of the clerk, where it remained from the time of its adoption until it was given to Gilkerson and Levy to be sent to Spitzer, Rorick & Company. It was not in the transcript of the proceedings sent to Spitzer, Rorick & Company. Gilkerson and Levy were subcontractors. It was not included in the transcript of the proceedings furnished the Rock Island Company (105) and the time when it was given to Gilkerson and Levy is uncertain. It remained away from the office of the clerk and continuously in the files of Spitzer & Company and Spitzer, Rorick & Company, or in the possession of W. H. Harris (74 & 108), and was returned between January 23, 1913, and March 7, 1913. (74, Stip. par. 12)

It is our contention that there was provided no lawful mode or trustworthy method by which the property sought to be assessed could be identified.

In *Upton v. People ex rel. Murrie, County Treasurer* (Ill.), 52 N. E. 358, it was held that property assessed for taxes must be described so as to be capable of identification by some lawful mode, such as a government survey, or a reference to an authenticated plat, or

by metes and bounds, and that unless it is so described as to be capable of such identification, the assessment and judgment resting thereon will be void.

In *People ex rel. Kochersperger v. Eggers*, (Ill.), 45 N. E. 1074, the court said:

“A proceeding of this character is against the land, and the subject-matter of the judgment will be void. Where it is not possible to tell what land was assessed, or against what land the judgment of confirmation was entered, the assessment and judgment will be void.”

See also *Becker v. Baltimore & O. S. W. Ry. Co.* (Ind.), 46 N. E. 685.

In *Pennsylvania Co. v. Cole*, 132 Fed. 668, it was held that the description of the property involved must be so definite that a conveyance, by the officer selling the same, containing that description, would be valid.

The property involved in this pretended levy has never been included in a quarter block. The town of Holdenville was an incorporated city and its streets were paved after the right of way of complainants had been granted, and the description, even with reference to the plat, is so indefinite as to be void under the rule adopted in the case last cited, and without the map it would be void under the most liberal rule.

If we assume that the adoption of the map by motion was a proceeding of which all should take notice, the record of such adoption shows only that City Engineer McIntosh presented the map showing the C. R. I. & P. Ry. property to be adopted for the purpose of platting the property in quarter blocks for the purpose

of assessing the benefits for paving purposes. It can not be assumed that the leasehold of the Rock Island Company of the right of way and station grounds of the Choctaw Company was the only property of the Rock Island Company at the city of Holdenville. There was nothing in the return of the appraisers to indicate that Blocks $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$ had any relation to such station grounds and right of way.

No notice given or record made could be said to have imparted notice to either appellant of the pretended assessment upon such grounds and way. The safeguards thrown about them by the laws providing for notice and intelligible records were disregarded and an opportunity to raise objections to the proceedings leading up to the assessment was thereby denied.

One of the rights of a property holder, whose property is charged with an assessment, is to have the proceedings sufficiently regular, and the property charged sufficiently identified, that, in case of his failure to pay the assessment, and of a resulting sale of the property, his remaining estate therein will not be wasted by the destruction of the surplus value above the assessment. It is his right to have the assessment so made and the proceedings so conducted that the maximum obtainable by sale in such manner may be obtained.

It is difficult to conceive of any person, investing in a title so indefinite and so precarious. It would be necessary for him to resort to outside evidence for the identification of his purchase.

If the mayor and city council had authority to plat into lots and blocks, or parts of blocks, unplatted por-

tions of the City of Holdenville, it was also certainly necessary for them to so identify the property by metes and bounds, or by reference to existing objects, as to enable one intending to purchase to know for what tract to bid to identify his purchase, and the selling officer to execute a valid conveyance. A proceeding such as this does not in our judgment constitute due process of law.

III.

Did the state laws authorize the assessment?

The Circuit Court of Appeals said in its opinion (122):

"The general rule, sustained by the weight of authority, is that a railroad right of way, whether owned in fee or held in easement, is real estate, property or ground which may be subjected to assessment for the cost of local improvements. See *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned in 197 U. S. 430; Dillon on Munc. Corp. sec. 1451, (5th Ed. p. 2586). We think that is also the rule in Oklahoma. See *M. K. & T. Ry. Co. v. City of Tulsa*, 45 Okla. 382, 145 Pac. 398, involving a right of way owned in fee but not otherwise different from the one here; also *Oklahoma Railway Co. v. Severns Paving Co.* ----Okla.----, 170 Pac. 216, and *Oklahoma City v. Orthwein*, ---- C. C. A. ----, 258 Fed. 190, recently decided by this court."

The Circuit Court of Appeals was mistaken in its belief that it is the rule in Oklahoma that a railroad right of way, whether owned in fee or held in easement, is real estate, property or ground which may be sub-

jected to assessment for the cost of local improvements. The only decision of the question as to right of way not held in fee is in the case of *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 559. In that case the lower court, in its fifth conclusion of law, found at pages 270 and 271 of the Oklahoma report, speaking of a part of appellants' right of way conferred by the same grant, said:

"Considering the fifth submission: 'Can an assessment be made against a steam railroad company to pay for that portion of its right of way more than the portion between the rails and two feet on each side thereof, and, if so, according to what plan shall this assessment be levied?' From the agreed statement of facts it does not appear that prior to April 17, 1908, there existed any contractual relations between the steam railroad company and the city. This being true, the liability of the steam railroad company must be determined from the language of the act. The third proviso of section 1 of the act under consideration places the steam railway on the same basis as the street railway and binds it to no greater duty or liability in this respect. These railroad companies do not own their several rights of way, but simply occupy them and have easements therein obtained from the public. If in any case they have purchased and own the land occupied by and adjoining the right of way, there is no reason why in such cases the assessments should not be made against the land so owned, and in this event the plan of assessment would be the same as against the individual—the natural person."

The Supreme Court, in the opinion by Chief Justice Williams, stated, on page 298 of the report, that the conclusion of the lower court as to findings No. 5 appeared to be correct. The conclusion was, therefore,

approved by the highest court of the state, and the rule so established has not been disturbed by the subsequent decisions cited by the Circuit Court of Appeals.

The decision in each of the cases cited by the Circuit Court of Appeals rests upon the fact that the right of way was owned in fee, and could be by the owners devoted to other purposes at any time. In other words, it was not trust property, and was not charged with a public duty or use, and the owners enjoyed all rights that other owners of realty enjoy, including the more important value giving right to make it an article of commerce.

Of course, the only question decided by this court in the case of *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, was that arising from the assertion that the assessment violated the Fourteenth Amendment to the Federal Constitution by denying to the railway company the equal protection of the laws.

In the case of *M. K. & T. Ry. Co. v. City of Tulsa*, the opinion rests upon the fact that the lot which was subjected to the assessment was owned in fee by the railway company. The court said:

“—as plaintiff is the owner of the lots covered by its right of way and sought to be assessed, assuming them to be within the quarter blocks abutting on Cameron street and that such lots would be benefitted thereby, it would seem that so much of plaintiff's right of way would be subject to this assessment, as contended by the city. But such is a doubtful implication.”

The doubt expressed by the court rested upon the construction of the other provisions in the state law,

which provided the direct personal assessment against the corporation, and the distinction made between parties by the statute.

On page 389 of the Oklahoma report, the court said:

"But, as no other member of the court agrees with me, in view of the fact that plaintiff in error is the 'owner' in fee of these lots (*Gilbert et al. v. M. K. & T. Ry. Co. et al.*, 185 Fed. 102, 107 C. C. A. 320), I will, for the purposes of this case, concur in the view of the majority of the court
* * *"

In the case of *Oklahoma Railway Co. v. Severus Paving Co.*, the Oklahoma court said:

"The fee title to the strip of land in question here appears to be in the railway company. In the dedication to the city this strip was referred to in the following language:

"Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City and Suburban Railway, its successors and assigns, with like effect as though deeded and conveyed to said company in fee simple by separate deed."

* * * * *

"Another case relied on is that of *Davis v. Newark*, 54 N. J. Law, 144, 23 Atl. 276, in which it was said:

"It appears, however, that the strip of land thus owned has been dedicated to public use as a highway and forms part of the avenue."

"The railway company here holds an entirely different estate. Its right is not merely an intangible privilege or an easement, but under the terms of the dedication is a fee-simple title. Un-

der the provisions of section 511, Rev. Laws 1910, the terms of the dedication are to all intents and purposes a general warranty and sufficient conveyance to vest the fee simple of the lands described therein. Under section 1175 of this statute every estate in land conveyed by deed shall be deemed an estate in fee simple, unless limited by express words. Under section 1382 of this statute authority is given to the railway company to acquire land and to sell the same when no longer necessary to its use. In construing these provisions of the statute this court, in an opinion by Mr. Justice Turner, in the case of *M. K. & T. Ry. Co. v. City of Tulsa*, 45 Okla. 382, 145 Pac. 398, held that the railway company took the fee to the right of way under a general warranty deed. The United States Circuit Court of Appeals in the case of *Gilbert v. M. K. & T. Ry. Co.*, 185 Fed. 102, 107 C. C. A. 320, held to the same effect.

* * * * *

"The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles."

The status of that company, as related to its power to purchase and sell real estate, was very different from the status of the appellants, and this difference was not limited to the difference in title. These companies were not incorporated under the laws of the state of Oklahoma.

By Section 6 of Article 9 of the Oklahoma Constitution (Williams), page 93, it is provided:

“Railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways. Every railroad or other public service corporation organized or doing business in this state, under the laws or authority thereof, shall have and maintain a public office or place in this State, for the transaction of its business where transfers of stock shall be made, and where shall be kept, for inspection by the stockholders of such corporation, books, in which shall be recorded the amount of capital stock subscribed, the names of the owners of stock, the amounts owned by them, respectively; the amount of stock paid, and by whom; the transfer of said stock, with the date of transfer; the amount of its assets and liabilities, and the names and places of residence of its officers, and such other matters required by law or by order of the corporation commission. The directors of every railroad company, or other public corporation, shall hold at least one meeting annually in this state, * * *. The Legislature shall pass all necessary laws enforcing, by suitable penalties, all the provisions of this section.”

Section 11 of Article 9 of the Oklahoma Constitution (Williams), page 97, provides:

“No railroad, transportation, transmission, or other public service corporation in existence at the time of the adoption of this Constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution, applicable to railroads, transportation companies, transmission companies, and other public service corporations: Provided, That nothing herein shall be construed as validat-

ing any charter which may be invalid, or waiving any of the conditions contained in any charter."

Section 31 of Article 9 of the Oklahoma Constitution (Williams), page 117, provides:

"No railroad, oil pipe line, telephone, telegraph, express or car corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business in this state, shall be entitled to the benefit of the right of eminent domain in this state until it shall have become a body corporate pursuant to or in accordance with the laws of this state."

There are numerous other onerous provisions of the Constitution, all of which railroad companies must accept, in order to enjoy some of their corporate powers unless they be held repugnant to constitutional provisions, a contingency not to be certainly forecast. Sec. 31, withholding the power of eminent domain, has been amended so that the Corporation Commission of the state may grant that right, but that being "future legislation" its benefits are denied except on condition of the acceptance of all of the provisions of the Constitution, as required by Section 11, above quoted. Acceptance of the provisions of the Constitution also involves submission to Sec. 47 of Art. 9, page 127, which provides:

"The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citi-

zens of this state, in such manner, however, that no injustice shall be done to the incorporators."

There has been "future legislation" provided for domestication of foreign corporations, but it will be noted that the benefit of such future legislation is withheld except upon acceptance of all of the provisions of the Constitution as provided in Sec. 9, above quoted, and it appears to counsel that these provisions of the Constitution and laws of the state of Oklahoma compel the conclusion that these plaintiffs are not free to deal in real estate.

In the case of *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201, this court said in the sixth syllabus:

"Congress can confer upon a corporation of a state the right to construct a road within any of the Territories of the United States; and it may be well doubted whether the state subsequently created out of the territory, can put any impediment upon the enjoyment of such right. Any such interference would operate to divest the company of its title to lands granted by the United States."

Since the appellants' property is being operated as an entirety, the segregation and sale of particular portions of the right of way and station grounds would break the continuity of their lines, and, under the unusual state of the Oklahoma laws, would place a greater impediment upon the enjoyment of the rights and performance of the duties imposed by the granting acts than was in contemplation in the other cases. These could not, at the time of these proceedings, have secured other right of way by eminent domain or purchase, except by incorporating under the laws of the state; in other words, surrendering their charter rights. Sec.

31, Art. 9, Okla. Const., above quoted. Nor could they have the benefit of the change that has been effected by amendment to the Constitution without accepting all of the provisions of the Oklahoma Constitution, such as those requiring it to maintain its general offices in the state under Secs. 6 and 11, Art. 9, above quoted, and limiting passenger fares to two cents per mile, Sec. 37, Art. 9.

Respectfully submitted,

C. C. Blake
W. R. Blackmon
R. A. Tolbert
Roy St. Lewis

Thos. P. Littlepage
 of Counsel.

El Reno, Oklahoma,
 January 5, 1921.

Sidney J. Galiaferro

Office Supreme Court, U. S.

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CLERK

No. 211.

In the
Supreme Court of the United States.
October Term, 1920.

THE CHOCTAW, OKLAHOMA & GULF RAIL-
ROAD COMPANY AND THE CHICAGO, ROCK
ISLAND & PACIFIC RAILWAY COMPANY,
Appellants,

VERSUS

B. W. MACKEY, AS THE COUNTY TREASURER
OF HUGHES COUNTY, OKLAHOMA; THE
CITY OF HOLDENVILLE, *ET AL.*, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

JACOB B. FURRY and
GEO. S. RAMSEY,
Muskogee, Oklahoma,
W. H. HARRIS and
J. W. HARBAUGH,
Toledo, Ohio,
W. T. ANGLIN and
ALFRED STEVENSON,
Holdenville, Oklahoma,
Attorneys for Appellees.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1920.

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Appellants,

vs.

B. W. MACKEY, AS THE COUNTY TREASURER
OF HUGHES COUNTY, OKLAHOMA; THE
CITY OF HOLDENVILLE, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
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BRIEF of APPELLEES.

Statement of the Case.

It seems to us that the statement of the case in the brief of counsel for appellants is not sufficient to give the court a clear idea of the facts or questions involved, and we beg, therefore, to submit a more comprehensive statement of the issues involved.

On November 1, 1912, appellants, as plaintiffs, filed their bill in the District Court of the United States for the Eastern District of Oklahoma against the appellees, as defendants, to restrain the defendants, and especially B. W. Mackey, as Treasurer of Hughes County, Oklahoma, and all persons acting for, under or with him or in pursuance of his directions or authority, or authority of his office, from making any sale of plaintiffs' property in the City of Holdenville pursuant to certain assessments levied against plaintiffs' property to pay the cost of paving and otherwise improving Oklahoma Avenue in the City of Holdenville, and praying that the title and ownership of plaintiffs in said premises may be quieted as against the pretended lien of said assessments and that said assessments may be cancelled and declared null and void and removed as a cloud upon plaintiffs' title to the property covered by said assessments.

On March 3, 1913, defendants, B. W. Mackey, as County Treasurer of Hughes County, Oklahoma, and the City of Holdenville, filed their separate answer (Rec., p. 32), and on the same day Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, constituting the firm of Spitzer, Rorick & Company, and Madison G. Baldwin, filed their separate answer to plaintiffs' bill (Rec., p. 47).

The bill, after reciting jurisdictional facts, alleges the incorporation on November 28, 1887, under the laws of Minnesota, of the Choctaw, Coal & Rail-

way Company, which was empowered to mine, sell, market and deal in coal, iron and other ore and products thereof, to manufacture coke, charcoal, pig iron and various other metals; to buy, lease, deal in and work mineral lands, and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or development of any mine or quarry owned or operated by it (Rec., p. 3).

That by Act of Congress approved February 18, 1888, the Choctaw, Coal & Railway Company was empowered and authorized to construct and maintain a railway, telegraph and telephone line through what was then Indian Territory, from certain points in said act designated, and to construct and maintain a branch line to the leased coal veins of the Choctaw, Coal & Railway Company in the Choctaw Nation and from thence by some practical route to an intersection with the Atchison, Topeka and Santa Fe Railway Company between Halifax Station and Bear Creek, otherwise known as the North Fork of the Canadian River, all as more fully appears from said Act of Congress and an amendment thereof approved February 13, 1889 (Rec., pp. 3-4).

That pursuant to its charter the Choctaw, Coal & Railway Company proceeded to develop mines upon leases and to construct a railway; that in prosecution of its work it became insolvent and that it became necessary for the United States Government to make some provisions for the work undertaken by

it to be carried on in order that the leased mines might be operated for the benefit of the Indians as wards of the United States and for the purpose of the development of commerce in said territories and among the several states of the Union; that to accomplish said purposes and to secure the operation of said mines for the benefit of the Indians, and in the interests of interstate commerce the United States by an act approved August 24, 1894, empowered the purchasers of the rights-of-way, railroads, mines, coal leasehold estates and other property and franchises of the Choctaw, Coal and Railway Company at any sale made under or pursuant to any decree of court, to form a corporation and vested in said corporation formed all the right, title, interest, property, possession and claim and demand in law and equity in and to the rights-of-way, railroads, mines, coal leasehold estates and property of said Choctaw, Coal & Railway Company, together with all the franchises which had been conferred upon said Company by any and all Acts of Congress, or which it possessed by virtue of its charter; that pursuant to the last-named Acts of Congress there was organized the plaintiff, Choctaw, Oklahoma & Gulf Railroad Company.

That by section 4 of the Act of August 24, 1894, plaintiff, Railroad Company, was authorized to construct and operate branches from its line of railroad and for that purpose to take and use rights-of-way not exceeding 100 feet in width upon making compen-

sation therefor as provided for in the case of taking land for its main line, and to lease its railroads and mines and other property provided that the right to construct branches conferred by said section shall exist and be exercised in the Indian Territory only for the purpose of developing and working the leases mentioned in the Act of Congress of October 1, 1890.

That by Act of Congress approved April 24, 1896, the Government recognized the Choctaw, Oklahoma & Gulf Railroad Company pursuant to the act approved August 24, 1894, and further defined and described the rights, powers and duties thereof, and that by section 2 of said act it was provided that the powers defined by said section 4 shall extend to branches intended to aid the development of any coal or timber territory contiguous or tributary to the lines of the railroad of the said Choctaw, Oklahoma & Gulf Railroad Company, whether owned or controlled by said Railroad Company or by others, said branches not to exceed in length 5 miles, and to the construction and operation of a branch from any point on its existing line of railway to the northern line of the State of Texas, and for this purpose the said Company shall have the like rights, powers and franchises as to the acquisition of the right-of-way and depot grounds, and as to the construction and operation of said branch, and shall be subject to the like conditions and restrictions as it possesses or is subject to, under or by virtue of the provisions of

said Act of August 24, 1894, as to the line of Railroad acquired or constructed thereunder.

That pursuant to said Acts of Congress, plaintiff, Choctaw, Oklahoma & Gulf, became vested with all the rights of the Choctaw, Coal & Railway Company, conferred by Acts of Congress or possessed by it under its charter. That prior to March 24, 1904, said Railway Company acquired by construction and otherwise a line of railway extending from a point on the west bank of the Mississippi River opposite Memphis, Tennessee, by way of Little Rock, Arkansas, to a point at the boundary line between the Territory of Oklahoma and State of Texas at or near Texola, Greer County, Oklahoma. That pursuant to its rights it acquired the right-of-way and station grounds at what is now the City of Holdenville, consisting of a strip of ground 300 feet wide by 3,000 feet long, particularly described in the bill, and a large part of which is now within the corporate limits of the City of Holdenville.

That on March 24, 1904, the Choctaw, Oklahoma & Gulf Railroad Company, being authorized thereto by Congress leased to the Chicago, Rock Island & Pacific Railway Company, all its railway lines and appurtenances including the premises particularly described as its right-of-way and station grounds at Holdenville and its equipment, for a period of 999 years, and that said Chicago, Rock Island and Pacific Railway Company under the terms of said

lease succeeded to all the rights, powers, franchises, etc., of the Choctaw, Oklahoma & Gulf.

That plaintiffs have constructed and now maintain upon the rights-of-way and premises described, railway tracks, both main and sidings, composed of ballast, ties and steel, station houses, freight depots and other appurtenances in constant use in the performance of its charter powers. That its right-of-way and station grounds, or a portion thereof, are contiguous to and abut upon, at the north and east sides thereof, Oklahoma Avenue, a street in the City of Holdenville.

That the City of Holdenville under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved April 17, 1908, and acting by and through its mayor and councilmen, pursuant to said resolutions and ordinances referred to in said bill, levied certain assessments on certain portions of the right-of-way and station grounds of plaintiffs in the City of Holdenville to pay the cost of paving and otherwise improving Oklahoma Avenue. That by virtue of the proceedings had and taken by the mayor and council of the City of Holdenville, a part of the right-of-way and station grounds of the plaintiff which had been assessed for the improvement of Oklahoma Avenue was about to

be sold by the County Treasurer of Hughes County, of which the City of Holdenville is the county seat, for the delinquent assessments which became due and delinquent September 1st, 1911, and September 1st, 1912. That unless restrained and enjoined, the said Mackey as County Treasurer would proceed to sell a part of the right-of-way and station grounds of plaintiff in the City of Holdenville and that by said pretended assessment they sought to segregate a portion of the premises granted to the plaintiff by the Congress of the United States and attach thereto a lien for the payment of such paving and street improvements. That such segregation of a portion of the premises and a consequent lien thereon, if permitted, would be contrary to and destructive of the purposes of said grant by the Congress of the United States and that there is no authority of law therefor.

The bill further averred there was no legal plat of any tract or tracts of land within the City of Holdenville showing any subdivision of plaintiffs' right-of-way and station grounds into blocks or quarter blocks purported to be assessed by the assessing ordinance or which included any blocks designated as 33½, 44½, 52½, 68½, 78½, referred to in the assessment ordinance, and that in truth and in fact no such blocks did exist and that Assessment Ordinance No. 27, purporting to assess portions of said blocks, is wholly void and of no effect.

The bill further alleges that Celian M. Spitzer, Adelbert L. Spitzer, Horton C. Rorick and Carl B.

Spitzer, partners as Spitzer & Company, and the City of Holdenville, do claim to have an interest in and to all or a portion of the warrants and bonds issued by the City of Holdenville under the terms of said Acts of the Legislature in payment of said paving and street improvements for which said pretended assessment was laid against the property of the plaintiffs (Rec. p. 23).

The answers of the defendants admit practically all of the allegations of the bill; they admit the incorporation and residence of plaintiffs, the various Acts of Congress referred to in plaintiffs' bill, the construction of the railroad, the development of coal mines under leases and transfer of the rights of the Choctaw, Coal and Railway Company to the Choctaw, Oklahoma & Gulf Railroad Company, the execution of a lease by the Choctaw, Oklahoma & Gulf to the Chicago, Rock Island & Pacific, as set forth in complaints' bill; they admit the authority granted by the Acts of Congress referred to and the grant of the right-of-way and station grounds at Holdenville as described in plaintiffs' bill; admit that certain tracts of land, being a part of the plaintiffs' right-of-way and station grounds at Holdenville were assessed for a due proportion of the cost of improving Oklahoma Avenue, and said property in the assessment ordinance, levying said assessments was described as the

North quarter block of block numbered 33½,
The east quarter block of block numbered 33½,

The north quarter block of block numbered $44\frac{1}{2}$,
The east quarter block of block numbered $44\frac{1}{2}$,
The north quarter block of block numbered $52\frac{1}{2}$,
The east quarter block of block numbered $52\frac{1}{2}$,
The east quarter block of block numbered $68\frac{1}{2}$,
The north quarter block of block numbered $68\frac{1}{2}$,
The north quarter block of block numbered $78\frac{1}{2}$,

and that said quarter blocks were assessed in the amounts set forth in plaintiffs' bill and that said tracts of land are and do constitute a part of plaintiffs' right-of-way and station grounds.

Defendants deny that there was no sufficient determination of proper quarter block districts of that portion of plaintiffs' station grounds fronting and abutting upon said improvement for the purpose of appraisal and apportionment of the benefits and assessments of cost in accordance with said appraisal and apportionment as provided in and by said Act of the Legislature of Oklahoma, approved April 17, 1908, and allege the adoption on June 29, 1910, by the mayor and city council of a map or plat subdividing into quarter block districts that portion of the right-of-way and station grounds of plaintiffs assessed and subject to assessment under the laws of Oklahoma (Rec., pp. 37-38).

Defendants further allege that by virtue of the Acts of the Legislature of Oklahoma, it is provided that

"If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include

such property in proper quarter block districts for the purpose of appraisalment and assessment;"

and defendants allege that such portion of plaintiffs' right-of-way and station grounds as abutted upon such improvement throughout the length of 1761 feet thereof was not platted into lots and blocks prior to the time it became necessary to make the appraisalment and assessment complained of in plaintiffs' bill, and that the mayor and council of the City of Holdenville prior to said appraisalment and assessment, and acting pursuant to said provision of the Act of the Legislature of Oklahoma, did include in proper quarter block districts for the purpose of such appraisalment and assessment all that part of said station grounds particularly described as follows, to-wit:

"All that part of said right-of-way and station grounds lying as aforesaid between Oklahoma and Choctaw Avenues in said City and extending from the southeasterly side of the area of intersection of the said right-of-way and station grounds with the right-of-way and station grounds of the St. Louis & San Francisco Railway Company a distance of 1761 feet approximately, in a southeasterly direction between said avenues to the northwesterly boundary line of Gulf Street in said City, as such line is extended in continuation thereof, across said right-of-way and station grounds between said Oklahoma and Choctaw Avenues:"

and that the City did direct and cause the city engineer to plat and map into proper quarter block dis-

tricts such part of said station grounds and did approve and adopt such map; that said map so adopted by the mayor and council did and does show the precise location of each of such quarter block districts and the precise dimensions thereof (Rec., p. 39), and that said map or plat made by the engineer subdividing into quarter block districts that part of plaintiffs' right-of-way and station grounds was adopted by the mayor and council of the City of Holdenville the 29th of June, 1910.

Defendants admit that by the proceedings of the mayor and council of the City of Holdenville it was sought to attach a lien to so much of plaintiffs' said tract of land as is included within said quarter block districts for the payment of the assessments levied under said ordinance against such quarter block districts for the payment of a portion of the costs of such improvement.

Defendants further deny that the reversionary interest in and to said premises is vested in the Government of the United States and allege that the reversionary interest, if any, in and to said land is vested in the Creek Nation or Tribe of Indians from which said lands were taken, and that by section 2 of said Act of Congress approved February 18, 1888, and the amendment thereof approved February 13, 1889, granting to the said Choctaw, Coal & Railway Company the lands constituting its right-of-way and station grounds, it is provided that when any portion of the lands so granted shall cease to be so used such

portion shall revert to the Nation or Tribe of Indians from which the same shall be taken; that said section 2 of said act is in words and figures, as follows:

"Sec. 2. That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right-of-way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right-of-way, or as much thereof as may be included in said cut or fill. *Provided,* That no more than said addition of land shall be taken for any one station. *Provided further,* That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."
(Rec., pp. 41-42.)

Defendants further deny that the United States or the nation or tribe of Indians from which the lands were taken is vested with any reversionary interest in and to said lands as against the right of Congress

to impose taxes and liens therefor upon said lands or as against the right of the State of Oklahoma to impose taxes and liens therefor upon said lands, whether for general revenue or for the payment of assessments for local improvements, and deny that the estate vested in plaintiffs in said land is such an estate as is not subject under the law to any assessment on account of paving or street improvement, and deny that there is no authority of law for the assessment so levied and allege on the contrary that by section 5 of the Act of Congress approved February 18, 1888, it was provided that Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes of Indians, to impose such additional taxes upon said railroad as it might deem just and proper for their benefit, and that any territory or state thereafter formed through which said railway shall have been established may exercise the like power as to such part of said railway as may lie within its limits. That said section 5 of said act is in words and figures following:

“*Sec. 5.* That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands the said railway may be located, the sum of fifty dollars, in addition to compensation provided for in this act, for property taken and damages done to individual occupants by the construction of the railway, for each mile of railway that it may construct in said Territory, said payments to be made in installments of five

hundred dollars as each ten miles of road is graded: *Provided*, That if the general council of either of the nations or tribes through whose lands said railway may be located shall, within four months after the filing of maps of definite location as set forth in section six of this act dissent from the allowance hereinbefore provided for, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe would be entitled to receive under the foregoing provision. Said company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior, the sum of fifteen dollars per annum, for each mile of railway it shall construct in said territory. The money paid to the Secretary of the Interior under the provisions of this act shall be apportioned by him, in accordance with the laws and treaties now in force, between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: *Provided*, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit; *and any territory or state hereafter*

formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act.” (Rec., pp. 43-44.)

Defendants for further and separate defense allege that the plaintiffs ought not to be permitted to say that so much of the right-of-way and station grounds as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment upon any or all of the grounds or for any or all of the reasons, complaints and objections set forth in their bill of complaint herein, because these defendants allege the fact to be that such proceedings were had by the mayor and council of said City of Holdenville for the making of said work of improvement, appraisement and apportionment of benefits and costs thereof, as that the mayor and council of said City did upon the return of the report of the board of appraisers showing their appraisement and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including so much of said plaintiffs' right of way and station grounds as was covered and included within said quarter block districts, appoint a time and place for holding a session to hear any complaints or objections that the said plaintiffs

or others might make concerning the appraisement and apportionment aforesaid as to any of such lots or tracts of land, and did give notice of such session and of the time and place of holding the same and did cause the city clerk to have such notice published in a newspaper published and of general circulation in said city, and which session at said time and place and for the purpose of hearing any complaint or objection concerning the appraisement and apportionment of benefits as to any of such lots or tracts of land was duly held by the mayor and council of said City; and notwithstanding the plaintiffs were required to take notice of all that was done by the City of Holdenville, the mayor and council, and officers of said City touching said improvement and assessment, and notwithstanding they had full knowledge of such proceedings and the making of such improvement and that it was intended by said City, mayor and council to assess such part of their said right-of-way and station grounds as did abut upon the said improvement for the payment of a portion of the cost of such improvement and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make complaint or objection concerning said appraisement and apportionment, and did fail to make any complaint or objection to said mayor and council of said City at any time or place concerning said appraisement and apportionment of benefits to so much of their said right-of-way and station

grounds as was included by the said mayor and council in said quarter block districts for the purpose of such appraisement and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said council in relation to the making of said improvement during the progress thereof and of the making of said appraisement and apportionment and of said assessment, and until the filing of their bill of complaint herein; and that they did not within sixty days after the passage by the mayor and council of said City, of the ordinance in their bill of complaint herein mentioned, making such final assessment, bringing any action or suit to set aside such assessment or to enjoin the levying or collecting of said assessment or contesting the validity of said assessment, upon any or all of the grounds or for any or all of the reasons, complaints or objections now in their bill of complaint herein set forth; that said ordinance making said final assessment, was passed by the said city council and approved by the mayor thereof on the 25th day of August, 1910, and that the plaintiffs' bill of complaint herein was not filed and their action herein commenced until, to-wit, the 1st day of November, 1912. That under and by virtue of an Act of the Legislature of the State of Oklahoma, entitled "An Act to provide for the improvement of streets and other public places within cities of the first class, by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency," approved on the 17th day of April,

1908, pursuant to which act the said improvements were made and the said assessments levied, in plaintiffs' bill of complaint complained of, it is among other things provided as in section 7 of said act set forth (a copy of which is here set out for the convenience of the court) in the words and figures following:

"Sec. 7. No suit shall be sustained to set aside any such assessment or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers provided for in section five, unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; *provided*, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment" (Rec., pp. 45-46-47. (Sec. 728, Appendix.)

The defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, and Madison G. Baldwin, as a further

answer as to them plead that plaintiffs ought not to be permitted to say that so much of the right-of-way and station ground as is included in said quarter block districts is not subject to the assessment in said bill of complaint described, or that said assessment upon said quarter block districts is void, or to contest the validity of such assessment and lien thereof, upon any or all of the grounds or for any and all of the reasons set forth in their bill of complaint herein, because these defendants allege the facts to be that such proceedings were had by the mayor and council of the said City of Holdenville for the making of said work of improvement, appraisement and apportionment of benefits and costs thereof, levying of assessments in accordance with such appraisement and apportionment upon the property therein described, including the plaintiffs' said property, for the payment of the cost of said work of improvement, as that the mayor and council of said City did on the 20th day of October, 1910, adopt a certain resolution, to-wit: Resolution No. 31, "providing for the issuance of street improvement bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma," in the aggregate sum of Eighty-six Thousand, Five Hundred Thirty-two and 5/100 Dollars (\$86,532.05); and that said City of Holdenville did issue such series of bonds of the tenor, denomination and number and with the interest coupons thereto attached, in accordance with and as provided

in said resolution; and that for a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company aforesaid, did purchase and acquire one of said bonds with the coupons thereto attached, and ever since have been and now are the owners and holders thereof, to-wit: Bond No. 19 in the sum of One Thousand (\$1000.00) Dollars, dated the 9th day of September, 1910, due and payable on the 15th day of September, A. D., 1912, with interest thereon from date thereof at the rate of six per cent per annum, evidenced by Coupons Nos. 1 and 2 thereto attached, which bond with the coupons thereto attached is in the words and figures following, to-wit:

“United States of America, State of Oklahoma,
County of Hughes, Number 19 1,000 Dollars

City of Holdenville

STREET IMPROVEMENT BOND

District No. 1.

Know All Men by These Presents, That the City of Holdenville, in the State of Oklahoma, a City of the first class, for value received hereby acknowledges itself indebted to and promises to pay the bearer the sum of

ONE THOUSAND DOLLARS

on the 15th day of September, A. D., 1912, with interest thereon from the date hereof until the principal sum shall be due at the rate of six per cent per annum, payable annually on the 15th day of September of each year, as evidenced by

and upon the surrender of the annexed interest coupons as they severally become due, provided that if this bond shall not be paid at maturity, it shall thereafter bear interest at the rate of ten per cent per annum until paid, and both principal and interest are payable in lawful money of the United States of America at the Fiscal Agency of the State of Oklahoma, in the City of New York.

This bond is one of a series of bonds of like date and tenor issued by the City of Holdenville under authority of and in full compliance with 'An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same and declaring an emergency', approved April 17, 1908, as amended and in pursuance of resolutions and ordinances of said City duly passed, approved, recorded, authenticated and published, as required by law, for the purpose of procuring the necessary means to pay the cost and expense of improving the following named streets and parts of streets in said City: That portion of Oklahoma Avenue beginning at the intersection of the St. Louis & San Francisco Railroad right of way and the right of way of the Rock Island right of way at the Union Station and extending to the southeast side of Oak Street: That portion of Oak Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street: That portion of Cedar Avenue, beginning on Oklahoma Avenue and extending to the southwest side of Eighth Street: That portion of Creek Street beginning on Oklahoma Avenue and extending to the northeast side of Seventh Street: That portion of Echo Street

beginning on Oklahoma Avenue and extending to the northeast side of Sixth Street: That portion of Sixth Street beginning on Echo Street and extending to Oak Street: That portion of Seventh Street beginning on Creek Street and extending to Oak Street: That portion of Sixth Street beginning at the southeast side of Oak Street and extending to the northwest side of Gulf Street, constituting Street Improvement District No. 1 of said City and is payable solely from assessments which have been legally levied upon the lots and tracts of land benefited by said improvements, which assessments said City of Holdenville undertakes to collect, as by law provided, and the faith, credit, revenues and property of said City are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained in this bond.

And it is hereby declared and certified that all acts, conditions and things required to be done and to exist precedent to and in making said improvements and levying of said assessments, and the issuing of this series of bonds, have been properly done, happened and performed, and do exist, in regular and due form, time and manner as required by the Constitution and Laws of the State of Oklahoma, and that the total amount of said assessments or any installment thereof, and of the bonds issued on account of said improvements, including this bond, do not exceed any constitutional or statutory limitations.

In Witness Whereof, The City of Holdenville, by its Mayor and Council, has caused this bond to be signed by its Mayor and attested by its clerk and its corporate seal to be hereto af-

fixed and the interest coupons thereto attached to be signed by the fac-simile signature of its Clerk, and this bond to be dated the 9th day of September, 1910.

(Seal of City). F. P. Rutherford, Mayor.

Attest: I. A. Draper, City Clerk.

State of Oklahoma, County of Hughes—ss.

I, I. A. Draper, Clerk of the City of Holdenville, in the County and State aforesaid, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that said bond has been duly registered in my office

Witness my hand and official seal this 24th day of October, A. D. 1910. I. A. Draper,

(Seal) Clerk of the City of Holdenville.

No. 19, State of Oklahoma, County of Hughes, City of Holdenville, Street Improvement Bond District No. 1, 1,000 Dollars, Interest 6 Per Cent, Dated September 9, 1910, Due September 15, 1912, Interest Payable September 15 each year, Principal and Interest payable at the Fiscal Agency of the State of Oklahoma in the City of New York, N. Y.

No. 2

September 15, 1912

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk.

No. 1

September 15, 1911.

The City of Holdenville, State of Oklahoma, will pay the bearer Sixty Dollars, at the Fiscal Agency of the State of Oklahoma, in the City of New York, being interest then due on its Street Improvement Bond of Street Improvement District No. 1, dated September 9, 1910.

I. P. Draper, City Clerk."

And that for a valuable consideration and before the maturity thereof the defendant Madison G. Baldwin, did purchase and acquire one of said bonds with the coupons thereto attached and ever since has been and now is the owner and holder thereof, to-wit: Bond No. 77 in the sum of One Thousand Dollars (\$1,000.00) dated September 9, 1910, due and payable, on the 15th day of September, A. D. 1919, with interest thereon from the date thereof at the rate of six per cent per annum, as evidenced by nine coupons to said bond attached, which bond was of precisely the same tenor as the bond hereinabove set out, differing therefrom only in the date of maturity thereof, and in the time of payments of coupons thereto attached.

That neither of said bonds nor any part thereof, nor the interest thereon nor any part thereof, has been paid by the said City of Holdenville from assessments levied for the payment thereof, or at all, except that the interest represented by said Coupons Nos. 1 and 2, has been paid.

And these defendants allege further that they purchased and paid for said bonds in absolute and

full reliance upon the said resolutions and ordinances, map and proceedings, made, passed and approved by the Mayor and Council of the said City of Holdenville, and the record thereof in the journal of their proceedings, and that all acts, conditions and things required to be done and to exist precedent to the making of said improvement, and the making and levying of said assessment, and the issuance of said bonds, had been properly done, happened and performed, and did exist in regular and due form and manner as required by the laws of the State of Oklahoma, as so stipulated upon the face of said bonds and shown by the journal of said proceedings of the said Mayor and Council, and in good faith and absolute and full reliance upon the silence of the plaintiffs in relation to said proceedings and their acquiescence therein, and especially upon their silence and acquiescence in said ordinance levying assessments as aforesaid upon their said property included within said quarter block districts.

That notwithstanding the plaintiffs were required to take notice of all that was done by the Mayor and Council of the City of Holdenville and officers of said City touching said improvement and assessment and the including of their property in quarter block districts for the purpose of appraisalment and apportionment of the benefits of such improvement thereto, and for the purpose of assessment thereof for the payment of the cost of such improvement, and notwithstanding they had full knowl-

edge of such proceedings and the making of such improvement and that it was intended by said Mayor and City Council to assess such part of their said right of way and station ground as did abut upon said improvement, for the payment of a portion of the cost of such improvement, and that such assessment would thereby become a lien thereon, the plaintiffs and each of them did fail and neglect to appear at such session to make such complaint or objection concerning such appraisement and apportionment, and did fail to make any complaint or objection to the Mayor and Council of said City at any time or place concerning said appraisement and apportionment of benefits to so much of their said right of way and station grounds as was included by the said Mayor and Council in said quarter block districts for the purpose of such appraisement and apportionment and assessment, but remained silent and acquiesced in all the proceedings of said Mayor and Council in relation to the making of said improvement during all the progress thereof and of the making of such appraisement and apportionment and of said assessment, until the filing of their bill of complaint herein, and did fail and neglect to take any steps to prevent the making of said assessments upon their said property or to prevent the issuance of said bonds for the payment of the cost of said improvement, but did remain silent and acquiesce therein, receiving the valuable and lasting benefits of said improvement to their said property, well knowing the

said series of bonds, including the said bonds so purchased and now owned by these defendants, were payable solely out of the moneys to be raised by assessment against the property benefited thereby.

That these defendants purchased and paid for said bonds as aforesaid without any notice, knowledge or information that the plaintiffs had any objection to the assessment of their said property for the payment of the cost of said improvement.

That by reason of the premises the said plaintiffs are forever estopped and precluded from making said objection and objections in their bill of complaint herein set forth concerning said final assessment of their said property, and the lien of said assessment thereon, and from contesting the validity thereof, upon any of the grounds or for any of the reasons in their bill of complaint herein set forth (Rec., pp. 63-68.)

The EVIDENCE.

A stipulation as to the facts was signed and filed, and, omitting therefrom the exhibits, is as follows: (Rec., p. 68.)

STIPULATION.

“For the purpose of this cause it is hereby admitted, stipulated and agreed by and between the complainants and the defendants herein, that:

“1. That the tract of land 300 feet in width and 3,000 feet in length, specifically described in the Bill of Complaint herein, and therein alleged to constitute complainants' right-of-way and station grounds, extends in a northwesterly and southeasterly direction, and the larger portion thereof lies between Oklahoma and Choctaw Avenues, which are avenues within the corporate limits of the said City of Holdenville; and that such portion of said tract constitutes the railway right-of-way, yards and station grounds of the complainants. Oklahoma Avenue in said city runs parallel and is contiguous to the lands constituting said right-of-way and station grounds along the northeasterly side thereof and said avenue and station grounds have a common boundary line between them. Choctaw Avenue in said city runs parallel and is contiguous to said tract constituting said station grounds along the southwesterly side thereof, and said avenue and station grounds have a common boundary line between them. The said tract of land constituting said station grounds is 300 feet in width and occupies all the space between

said Oklahoma Avenue on the northeast side thereof and Choctaw Avenue on the southwest side thereof.

"2. The right-of-way of the St. Louis and San Francisco Railroad Company extends in a northeasterly and southwesterly direction and intersects the right-of-way and said station grounds of the complainants, which runs as aforesaid in a northwesterly and southeasterly direction, and so much of said Oklahoma Avenue, for the improvement of which the assessment was made of which complainants complain, and which was improved as alleged, is 1,461 feet in length, extending from the point of intersection of the northeasterly boundary line of the said station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the said St. Louis and San Francisco Railroad Company, in a southeasterly direction along the said station grounds of the complainants.

"3. The surface improvement of said Oklahoma Avenue, throughout the said 1,461 feet, extends outward a distance of 30 feet from the northeasterly boundary line of said station grounds, and consists of the grading, paving, curbing, guttering and draining of the same.

"4. That the said town of Holdenville was incorporated as a municipal corporation and its territory defined by legal subdivisions according to the Government survey, on the 14th day of November, 1898, and such legal subdivisions constituting the territory of the said incorporated town of Holdenville were:

'The Southeast Quarter of the Southeast Quarter of Section Twelve (12), in

Township Seven (7), North of Range Eight (8), East of the Indian Meridian;

'The East Half of the Northeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section Thirteen (13), in Township Seven (7) North, of Range Eight (8) East of said Meridian;

'The South Half of the Southwest Quarter, and the Southwest Quarter of the Southeast Quarter of Section Seven (7), in Township Seven (7) North of Range Nine (9) East of said Meridian;

'The West Half of the Northeast Quarter, and the Northwest Quarter of the Southeast Quarter, the North Half of the Southwest Quarter, and the Northwest Quarter, of Section Eighteen (18), in Township Seven (7) North, of Range Nine (9) East of said Meridian;'

constituting a tract of land one mile square, according to that Government subdivision.

"That the Secretary of the Interior, under and by virtue of the terms of the Original Creek Agreement, caused to be surveyed, staked and platted, the said town of Holdenville, and did on the 27th day of November, 1901, approve a plat of such survey, a copy of which plat with all the endorsements thereon, is hereto attached, marked 'Exhibit A' and made a part of this stipulation.

"That that tract of land 300 feet in width and 3,000 feet in length and specifically described in the bill of complaint herein, and herein alleged to constitute complainants' right-of-way and station grounds, did constitute a part of the territory within the corporate limits of

the said town of Holdenville as so defined on the 14th day of November, 1898, and ever since has been and is now within the corporate limits of said town, and its location, relative to the blocks and streets of said town is correctly delineated and shown on said map, a copy of which, marked 'Exhibit A,' is hereto attached as aforesaid.

"4. That in the proceedings of the Mayor and Council herein mentioned, for the improvement of certain streets and avenues in the said City of Holdenville, and the assessments of lots and blocks in said city for the payment of the cost of such improvement, the references therein contained to streets and avenues, and to lots and blocks other than those comprising said right-of-way and station grounds of the complainants, are the same streets and avenues, lots and blocks, named and numbered, and located precisely the same as shown on said map marked 'Exhibit A' as aforesaid; and as to the territory covered by said map marked 'Exhibit A,' it did, at the time of the proceedings by the Mayor and Council herein mentioned for the improvement of certain streets and avenues in said city, and does now constitute the official map of said City of Holdenville.

"5. That wagon crossings over said right-of-way and station grounds of complainants have been installed and maintained for public use for several years on the line of said Echo, Cedar and Oak Sts., as shown on the map hereto attached and marked 'Exhibit A'; and that on the north side of said Oak Street crossing, a concrete sidewalk has been laid across the right-of-way and station grounds for public use, and on one other of the said three street crossings prep-

aration by grading has been made on both sides of such crossing to put in sidewalks for public use. Said Creek Street is not open to travel across said station grounds.

"6. So much of said tract of land constituting the right-of-way, station grounds and railway yards of the complainants as abuts as aforesaid on said Oklahoma Avenue throughout the said length of 1,461 feet thereof, has constructed thereon the complainants' main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all in use, and the said Echo, Creek, Cedar and Oak Streets, and Oklahoma Avenue, are the principal thoroughfares leading from the business center of said city, and from surrounding country to the said main and side tracks, passing tracks, house track, passenger and freight depots, express office, cotton platform, grain elevators, and storage houses, all of which said improvements, except passing tracks, are located on that portion of said right-of-way and station grounds on the northeast side of the center line thereof. Very much the larger portion of the freight and passenger business done in said City of Holdenville by the complainants is derived from passenger and freight traffic conveyed to and from said station grounds and railway yards over said Oklahoma Avenue, Echo, Creek, Cedar and Oak Streets, and over the improvements on said avenue and streets, for the payment of which the assessments were levied of which complainants complain. That a copy of a plat showing the tracks and other structures and location thereof upon said station grounds and railway yards of complainants abutting on

said Oklahoma Avenue, is hereto attached, marked 'Exhibit B,' and made a part of this stipulation.

"7. That the elevator, storage houses, oil warehouse and coal bins shown by said plat rest upon sites used under permits by complainants to persons and companies for use in handling commodities transported over the complainants' lines, and said persons and companies so using said sites also transact thereon a local business in such commodities with others than the complainants; that said permits are subject to termination on thirty days' notice by either party. And one of complainants' railway tracks on said station grounds and railway yards is constructed along the northeast side of such grounds and yards and in such proximity to that part of Oklahoma Avenue improved as herein shown for the distance of 800 feet in length, as that the one side of the freight car, or cars, standing on any part of such track throughout the said 800 feet, is flush with the edge of said avenue and improvement, so that in loading complainants' freight cars with certain freights for transportation, and in unloading certain freights therefrom, wagons delivering and receiving such freights stand upon the improved portion of such avenue while unloading therefrom into said cars and while loading such wagons out of such cars, and have made such use of said avenue and improvement ever since said improvements were made.

"8. Under and by virtue of the Act of the Legislature of the State of Oklahoma, mentioned in complainants' bill of complaint herein, it is provided, among other things, that,

'If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block district for the purpose of appraisalment and assessment, as herein provided.'

"9. That portion of complainants' right-of-way, railway yards and station grounds abutting as aforesaid on said Oklahoma Avenue throughout the length thereof, from the point of intersection of the northeasterly boundary line of said right-of-way and station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the St. Louis and San Francisco Railroad Company, and lying between said Oklahoma and Choctaw Avenues, had not been platted into lots and blocks, and the Mayor and Council of said City of Holdenville on June 29, 1910, by motion, adopted a map, a copy of which is hereto attached, marked 'Exhibit C.' That the minutes of said City Council with reference to said map are as follows:

'City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

'Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

'Upon a vote of "aye" and "nay" by roll call the following vote was recorded. Those voting "aye," Adams, Bailey, Hyde,

Pickens, Reese, Taylor. Those voting "nay," none. Absent, Cornish, Nix.

'Motion declared carried and map adopted.'

"That on the original of said map the lines, showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$, 78 $\frac{1}{2}$, and the dollar signs followed by figures appearing therein, are in pencil, and attached thereto are certain affidavits and endorsements, copies of which are attached to said exhibit: that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the City of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of sub-dividing said right-of-way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements.

"10. Inasmuch as said Oklahoma Avenue extends in a southeasterly and northwesterly direction along the front of said blocks 33 $\frac{1}{2}$, 44 $\frac{1}{2}$, 52 $\frac{1}{2}$, 68 $\frac{1}{2}$ and 78 $\frac{1}{2}$, and the exterior lines of said quarter-block districts as shown by said map are on two of the opposite sides thereof parallel to said Oklahoma Avenue, and on the other two opposite sides thereof are at right angles to said Oklahoma Avenue, such quarter-block districts were, under said appraisalment and apportionment, and in the said ordinance levying said assessments, described with refer-

ence to the cardinal points of the compass, that is to say, the most northerly quarter-block of each of said blocks was given the designation of 'North $\frac{1}{4}$ Block of Block.....' (the number being inserted) and the most easterly quarter-block of each of said blocks was given the designation of 'East $\frac{1}{4}$ Block of Block.....' (the number being inserted).

"11. On June 1, 1910, an agent of complainants interviewed the City Clerk of Holdenville, one Draper, and on said date examined the records of the proceedings of said Council respecting the improvement of Oklahoma Avenue in said city; that said proceedings disclosed no plat or record thereof dividing complainants' said property into lots and blocks for any purpose, nor any appraisalment nor assessment thereof.

"12. After said map marked 'Exhibit C' herein had been approved and adopted by the City Council of the City of Holdenville, as hereinbefore set forth, and the said ordinance had been passed, levying the assessments of which the complainants complain, the said original map was included in a transcript of the proceedings of the Mayor and Council of said City of Holdenville touching the work of improvements of said Oklahoma Avenue and other streets, and delivered to the contractor performing the work and by him forwarded to Spitzer, Rorick & Company of Toledo, Ohio, they being the purchasers of the bonds issued by the City to procure the funds to construct said improvements, and who, upon discovering that said map so held by them was the original map, between January 23, 1913, and March 7, 1913, returned the said map to the City Clerk with the affidavits

and endorsements of McIntosh Barber Company attached thereto as shown by said Exhibit C hereto.

“ 13. After the said return of said map to the City Clerk of said City, which return took place after the commencement of this action, the Mayor and Council of said City did adopt a resolution, a copy of which is hereto attached marked ‘Exhibit D’.

“ 14. That there is no plat or record except the plat, a copy of which is attached hereto as ‘Exhibit C,’ and the record of the proceedings of the Mayor and Council adopting such plat, as aforesaid, which shows any subdivision of complainants’ said property into blocks numbered $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$.

“ 15. Such proceedings were held by the Mayor and Council of the City of Holdenville, touching the making of said work of improvement upon Oklahoma Avenue in said City, the cost thereof, the appraisement and apportionment of benefits conferred upon abutting property, as that the Mayor and Council of said City did, upon the return of the report of the Board of Appraisers showing the appraisement and apportionment of benefits to the several lots and tracts of land mentioned and described therein, including said ‘North $\frac{1}{4}$ block of Block $78\frac{1}{2}$, East $\frac{1}{4}$ block of Block $68\frac{1}{2}$, North $\frac{1}{4}$ block of Block $68\frac{1}{2}$, East $\frac{1}{4}$ block of Block $52\frac{1}{2}$, North $\frac{1}{4}$ block of Block $52\frac{1}{2}$, East $\frac{1}{4}$ block of $44\frac{1}{2}$, North $\frac{1}{4}$ block of Block $44\frac{1}{2}$, East $\frac{1}{4}$ block of $33\frac{1}{2}$, North $\frac{1}{4}$ block of Block $33\frac{1}{2}$,’ appoint a time and place for holding a session to hear any complaints or objections that the said complainants or others might make concerning the said

appraisement and apportionment aforesaid as to any such lots and tracts of land, and did give due notice of such session and of the time and place of holding the same, by causing the City Clerk of such City to have such notice published in a newspaper published and of general circulation in said City, and the Mayor and Council of said City did duly hold such session at the time and place so appointed and noticed, and did there and then, to-wit, on the 29th day of July, 1910, by resolution, confirm said report of such appraisement and apportionment as revised and corrected by them.

“16. The complainants and each of them did fail to appear at such session to make complaint or objection against such appraisement and apportionment, and did fail and neglect to make complaint or objection to said Mayor and Council at any time against such appraisement and apportionment of benefits to so much of their said tract of land constituting their said right-of-way and station grounds as was included as aforesaid in said quarter-block districts.

“17. Complainants did not, or did either of them, within sixty days after the passage by the Mayor and Council of said City of Holdenville of the ordinance in their bill of complaint herein mentioned, making the assessments of which they complain, a copy of which insofar as the assessments involved in this action are concerned is as alleged in the bill of complaint herein, bring any action or suit to set aside such assessment or to enjoin the levying or collecting of such assessment, or contesting the validity thereof upon any or all of the grounds or for any or all of the reasons, complaints or objections now in

their bill of complaint herein set forth. Said ordinance making said final assessment was passed by the said City Council and approved by the Mayor thereof on the 25th day of August, 1910, and published on the third day of September, 1910, and the complainants' bill of complaint herein was not filed and their action herein commenced until, to wit, the 1st day of November, 1912.

"18. The complainants had full knowledge of the commencement, and of the progress and completion of said work of improvement of and along said Oklahoma Avenue.

"19. The Mayor and Council of the City of Holdenville did on the 20th day of October, 1910, adopt a certain resolution, to-wit:

'Resolution No. 31.

'Providing for the issuance of street improvement bonds to pay the cost of paving and otherwise improving streets in Street Improvement District No. 1 of the City of Holdenville, Oklahoma.'

in the aggregate amount of Eighty-six Thousand, Five Hundred Thirty-two and 05/100 Dollars (\$86,532.05); and did issue such series of bonds of the tenor, denomination and numbers and with the interest coupons hereto attached, in accordance with and as provided in said resolution, except that Bond No. 29 for \$650.00 and Bond No. 55 for \$1,000.00 and Bond No. 56 for \$650.00 and Bond No. 65 for \$650.00, were not issued but cancelled, a copy of which resolution is hereto attached, marked 'Exhibit E.' and made a part of this stipulation.

"20. For a valuable consideration and before maturity thereof, the defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, did purchase and acquire all said series of bonds so issued, and were at the commencement of this action the owners and holders and are now the owners and holders of one of said series of bonds with the coupons thereto attached, to-wit, Bond No. 19 in the sum of \$1,000.00 dated the 9th day of September, 1910, due and payable on the 15th day of September, 1912, with interest from date thereof at the rate of six per cent per annum, evidenced by coupons numbered 1 and 2 thereto attached.

"21. For a valuable consideration and before maturity thereof the defendant, Madison G. Baldwin, did purchase and acquire and is now the owner and holder of one of said series of bonds with the coupons thereto attached, to-wit, bond No. 77 in the sum of \$1,000.00, dated September 9, 1910, due and payable on the 15th day of September, 1919, with interest from date thereof at the rate of six per cent per annum, evidenced by nine coupons numbered 1 to 9 both inclusive to said bond attached.

"22. Neither of said bonds numbered respectively 19 and 77, nor any part of the principal thereof, or the interest thereon or any part thereof, has been paid, except that the interest represented by said coupons numbered 1 and 2 on each of said bonds has been paid.

"23. The defendants, Horton C. Rorick, Adelbert L. Spitzer and Carl B. Spitzer, as Spitzer, Rorick & Company, and Madison G. Baldwin, purchased and paid for said bonds num-

bered 19 and 77 in reliance upon the resolution, orders, ordinances, maps and proceedings, made, passed and approved by the Mayor and Council of the said City of Holdenville, and the record thereof as the same appears upon the record of their proceedings, and they relied upon the recitals appearing on the face of said bonds.

“24. That on the 16th day of September, 1912, the City Clerk of said City of Holdenville made a certificate to the County Treasurer of Hughes County, Oklahoma, a copy of which in so far as the assessment involved in this action is concerned, is hereto attached and marked ‘Exhibit F’ and made a part hereof. And thereafter the said County Treasurer placed said described property on the delinquent tax list for the current year and advertised the same for sale in the amount of said installment of said assessment as shown by said certificate and penalties provided by law; that the description of the property involved in this action was in said advertisement the same as that shown by said certificate of said City Clerk.

“25. That on March 24, 1904, the said Choctaw, Oklahoma & Gulf Railroad Company leased to The Chicago, Rock Island & Pacific Railway Company all its railway lines and appurtenances thereto, including the premises particularly described in the bill of complaint herein, a copy of which said lease is hereto attached, marked ‘Exhibit G’ and made a part hereof.

“26. That a certain exhibit marked ‘A,’ attached to and made a part of the report of the appraisers mentioned in the bill of complaint, shows the description of each lot, piece or parcel of land and the amount appraised and appor-

tioned against each such lot, piece or parcel of land, and all that portion of such exhibit 'A' which gives a list of the lots, pieces and parcels of land fronting or abutting upon said Oklahoma Avenue and the amount of the appraisement and apportionment opposite such lot, piece or parcel of land as confirmed by the Mayor and Council is in the words and figures of the exhibit hereto attached, marked 'Exhibit H' and made a part of this stipulation, and is a true and correct statement of so much of said report.

"27. That section 1 of the assessing ordinance mentioned in the pleadings herein, omitting all those lots, pieces and parcels of land not fronting or abutting upon said Oklahoma Avenue and the amounts of the assessments against the same, is in the words and figures shown by 'Exhibit I' hereto attached and made a part of this stipulation.

"28. That the said right-of-way and station grounds, hereinbefore particularly described, are a part of the lands granted by the Congress of the United States for the purposes and as alleged in the bill of complaint herein and together with the said tracks and facilities located thereon, were at the time of the proceedings by said City Council and for a long time theretofore and ever since have been used as a part of said railway in the conduct of business as a common carrier of both interstate and intrastate commerce, and that a portion of the main track of said railway is upon the property sought to be subjected to the payment of assessments involved in this action.

"29. It is agreed that this cause be submitted upon the bill, answers and this stipula-

tion of facts, and such other competent, relevant and material evidence as the parties, or either of them, shall offer not inconsistent therewith.

C. O. Blake,

.....

Attorneys for Complainants.

J. B. Furry & E. C. Motter,

Attorneys for Defendants."

There was some oral testimony, the substance of which on behalf of plaintiffs was to the effect that J. G. Gamble, as attorney for the Rock Island, went to Holdenville during 1911 or 1912, and made an investigation with reference to the paving of Oklahoma Avenue, and that he found on the minutes of the proceedings of the City Council under date of June 29, 1910, record of a motion concerning the adoption of a certain plat. That he could not find the plat in any of the City offices and on inquiry was informed that neither the Mayor nor City Clerk nor City Engineer knew where the plat was. He was told by Mr. Draper, the City Clerk, that there was a plat; where or what it contained, he did not remember. The plat was not recorded in the office of the Register of Deeds nor in any other office so far as he could learn (Rec., p. 98). Several witnesses testified on behalf of the defendants; most of their testimony is covered by the facts included in the stipulation, but is to the effect that during the progress of the proceedings relating to these improvements of 1910, one or more officers of the Rock Island Railway called

on the City officials at different times, first on June 1st, 1910, and secured a copy of the resolutions and other proceedings relating to the improvement of this street had up to that time from the city clerk; they further testified as to the adoption of a plat on June 29, 1910, subdividing a portion of the railway company's right-of-way and station grounds into quarter blocks for assessment purposes, and that this map which had been prepared by the City Engineer was in the City Clerk's office for some months thereafter and that an enlarged copy of this map was tacked up on the wall in the office of the City Engineer, and that these maps were at all times open to inspection of any person who might inquire; that this map subdividing the Railway Company's property, together with a map of the City of Holdenville and the resolution appointing appraisers describing the property to be appraised, was delivered to the Board of Appraisers appointed by the City and used by them in the appraisement of the benefits and apportioning the costs of the improvements to the various lots and tracts of land in the Improvement District.

There is really no dispute as to any substantial fact with reference to these proceedings or with reference to the issues in controversy. The City Clerk testifies (p. 104) that he went over this map in the City Engineer's office with a representative of the Rock Island Road and showed him this paving district several times. Again just after the passing of

the assessment ordinance the City Clerk testified that a representative of the Company came to his house; he went with him to the printer's office and got a paper containing a copy of the assessment ordinance and then went to Mr. Rutherford's store (Mr. Rutherford was Mayor), and talked there with the Mayor, Mr. Rutherford, in regard to the matter. They had a copy of the assessment ordinance before them at the time. (Rec., pp. 98-109.)

We think this testimony is important mainly to show that the plaintiffs had full knowledge and notice of all the proceedings and the various steps had and taken with reference to these improvements during their progress and it is not disputed that they took no steps whatever to stop the proceedings, to protect the contractor or the bond buyers, until more than two years after the improvements were completed.

The case was submitted to the trial court on June 23rd, 1916, and decided in January, 1918. (Rec., p. 109.)

The trial court granted an injunction and on appeal from that decree to the Circuit Court of Appeals of the Eighth Circuit, the decree of the District Court was reversed and the cause remanded with directions to dismiss the bill. (Rec., p. 124.)

ARGUMENT.

The specifications of error relied on by counsel for appellants, as set forth on page 12 of their brief, are as follows:

1. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the tract or **parcel of complainants' right-of-way** and station grounds, described in the bill of complaint, or petition, was not, under the Constitution and laws of the United States, exempt from its pretended assessment and from segregation and sale thereunder separate from the railway franchise.
2. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the complainants' easement of right-of-way and station grounds sought to be assessed and sold was sufficiently identified in the proceedings therefor to afford due process of law, and that the enforcement of the pretended assessment was not, for that reason, repugnant to the Fourteenth Amendment to the United States Constitution.
3. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the state laws authorizing assessments for local improvement and sale for non-payment, authorize special assessments against, and the sale of, the easement of right-of-way and station grounds described in the bill of complaint.

Before proceeding further, we desire to suggest that the constitutional questions referred to in ap-

pellants' specifications of error are now raised for the first time.

A careful examination of appellants' bill fails to disclose any objections to the assessments complained of on constitutional grounds.

An examination of the opinion of the District Judge, fails to disclose a decision or discussion of any constitutional question, unless by inference he had in mind that clause of section 8, article 1, which gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The same is true with reference to the opinion of the Circuit Court of Appeals. (Rec., p. 121.) The question of due process of law or of the equal protection of the laws, provided for by the Fourteenth Amendment to the Constitution is no where discussed in the entire record. The only reference to the matter we find is in the opinion of Circuit Judge Hook in the following language:

"The general rule, sustained by the weight of authority, is that a railroad right-of-way, whether owned in fee or held in easement, is real estate, property, or ground, which may be subjected to assessment for the cost of local improvements."

(See *Louisville & N. R. Co. v. Farber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned in 197 U. S. 430. (Rec., p. 122.)

We respectfully submit, therefore, that the questions now raised for the first time in this cause should not be considered by this court.

Before taking up the questions argued in appellants' brief, we call the court's attention to other matters shown by the record which, in our opinion, should prevent the appellants from obtaining the relief sought.

The assessment ordinance complained of was passed and approved August 25, 1910, and published September 3, 1910, while complainants' bill was not filed until November 1st, 1912 (Rec., p. 75, finding 17).

Complainants admit that they had full knowledge of the commencement and of the progress and completion of said work of improvement (Rec., p. 75, finding 18).

Complainants admit that notwithstanding they had full knowledge of the commencement and of the progress and completion of this improvement, they took no step towards bringing any suit to set aside the assessment or to enjoin the levying or collection of the same, or to contest the validity upon any grounds or for any purpose, or to in any way stop the proceedings and prevent the assessments against their property during the progress of the work, but waited until the contractor had expended his money, and the defendants herein, Spitzer, Rorick & Company and Madison G. Baldwin, and the City, had advanced their money in good faith and issued and

purchased the bonds in reliance upon the proceedings had and taken by the Mayor and City Council.

No Objections Are Made to the Regularity of the Proceedings by the City of Holdenville.

It is to be noted that the bill raises no question as to the sufficiency or regularity of the proceedings by the City of Holdenville, or of any of its officers, in relation to the improvements referred to, and the assessments complained of, with one exception. The single exception being, that no sufficient plat was made or filed or recorded, and no sufficient subdivision into the quarter block districts was made by the City of Holdenville, of that part of the complainants' property assessed for its proper proportion of the costs of the improvements, as set forth in the 16th and 17th paragraphs of the bill.

With the single exception noted, therefore, the court must take it for granted that all the proceedings had and taken by the City of Holdenville in regard to the improvement of Oklahoma Avenue and the assessment levied to pay the costs thereof, are regular and in all respects in conformity to the provisions of the Act of the Oklahoma Legislature approved April 17, 1908, as amended (in a matter immaterial so far as this case is concerned) March 23, 1909.

The Oklahoma Statute under which these improvements were made is found in Session Laws 1907-8, pages 166 to 177, and this act with the amend-

ment of section 3 made in 1909 is found in Snyder's Compiled Laws of 1909, page 329, being sections 722 to 733, inclusive.

For the court's convenience we have had sections 722 to 728 inclusive of the Compiled Laws of Oklahoma, 1909, being all the paving law in force at the time of the proceedings in this case, applicable thereto, copied in the Appendix to this brief.

No Complaint That Assessments Are Unjust or Inequitable, Nor That Complainants Have Not Received Benefits Equal to the Assessments Levied.

It must be further noted that the bill makes no complaint that the assessments levied and sought to be collected are unjust, inequitable or in excess of the benefits received by complainants by reason of the improvements made, or out of proportion to the assessments levied on other property in the district. On the contrary, complainants' bill affirmatively shows, as recited in the report of the appraisers set forth in the bill, that the appraisers within five days after being notified of their appointment proceeded

“To appraise and apportion to said several lots and tracts of land, the benefits resulting there- to on account of making said improvements. That in making said appraisement and appor- tionment, we first apportioned to each quarter block its due proportionate charge according to the amount and of work performed upon the abutting streets and other public places, includ-

ing street intersections and alley crossings, which respective amounts appraised, apportioned and adopted, we find just, equitable and accurate, and that the several respective quarter blocks are benefitted to the extent of the respective amounts so apportioned." (Rec., p. 13.)

As the proceedings, therefore, show on their face the property assessed was benefitted to the extent of the assessment, and that the costs of the improvement was apportioned to the several lots and tracts of land in the improvement district in proportion to the benefits received, as the law requires shall be done, the bill must be taken as showing affirmatively on its face that complainants have received full benefit to the extent of the assessments at least, because of the improvements made.

Jurisdiction or Authority of the City to Levy Assessments Not Questioned.

It must be further noted that the bill raises no question of the jurisdiction or authority of cities of the first class in Oklahoma to levy special assessments for street improvements. The Act of April 17, 1908, above referred to, section 1 (Sec. 722, Appendix), grants to cities of the first class full and plenary authority to

"establish and change the grade of any streets, avenues, lanes, alleys, and other public places in such cities, and to permanently improve the same by paving, macadamizing, curbing, guttering and draining the same, including the install-

ing of all manholes, catch basins, and necessary drainage pipes, whenever in their judgment the public convenience may require such improvements, subject only to the limitations prescribed in this act."

Section 1 of this act (Sec. 722, Appendix) further provides :

"That when a steam railway company shall occupy any portion of a street with its tracks running in the general direction of such street, either on or adjacent thereto, that the said steam railway company shall improve the space between its said tracks, and two feet on either side thereof in the same manner that said streets shall be improved, and the same as is hereby required of street railway companies, and in case any steam railroad or street railway company shall occupy an alley with its track or tracks, such company shall be required to improve gutter, drain, grade or pave such alley in the manner that may be required by the ordinance of such city, and where any railroad company shall cross with any street that is being, or has been paved, the City Council may require such railroad company to pave so much of said street as may be occupied by its track or tracks, and two feet on each side, and when more than one track crosses such street within a distance of 100 feet said railroad company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same manner as the city may be improving, or has improved, the other portion of said street, and that the city may require, in addition to the improvement of such street as herein required, that said railroad company shall construct sidewalks with

such material as the city may by ordinance require upon either or both sides of such streets, etc."

The provisions of our paving law, as applied to street and steam railroads, have been before the Supreme Court of Oklahoma in

Oklahoma City v. Shields, 22 Okla. 265, 100 Pac. 559;

M., K. & T. Railway Co. v. City of Tulsa, 45 Okla. 382, 145 Pac. 398;

Oklahoma Railway Co. v. Severns Paving Co., (Okla.) 170 Pac. 216-220, 251 U. S. 104;

Oklahoma City v. Ortherlein, 258 Fed. 190.

It must be noted that the portion of our paving law above quoted is made to apply

"When a steam railway company shall occupy any portion of a street with its tracks running in a general direction of such street, either on or adjacent thereto."

and also,

"where any railroad company shall cross with any street that is being or has been paved."

In this case the property of complainants does not occupy any portion of the street improved, as shown by the map offered in evidence (Rec., pp. 78-79, Exhibit "C"). The right-of-way and station grounds run parallel with Oklahoma Avenue, and front or abut on Oklahoma Avenue.

Section 3 of the Act of April 17, 1908 (Sec. 724, Appendix), provides as follows:

"The lots, pieces or parcels of land fronting and abutting upon any such improvement, shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which such block abuts, together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which costs shall be apportioned among the lots and subdivisions of such quarter block, according to the benefits to be assessed to each lot or parcel as hereinafter provided. * * * If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block district for the purpose of appraisalment and assessment as herein provided."

The bill (Rec., p. 2) alleges that the defendant, The City of Holdenville, is a municipal corporation of the first class, organized and existing under the laws of the State of Oklahoma, and is located in Hughes County, Oklahoma. This allegation is admitted by the defendants, and there is no question, therefore, that the City of Holdenville did not have all the powers granted by the laws of Oklahoma to cities of the first class.

Legal Objections to Assessments.

As we construe complainants' bill, but three objections are made to the legality of the assessment, which may be briefly summarized as follows:

First. That complainants, by virtue of certain Acts of Congress referred to in the bill and of the powers and authorities thereby granted to complainants, and the Choctaw Coal & Railroad Company, of which company complainants claim to be the successor, are agencies or instrumentalities of the federal government in the execution and exercise of its governmental powers in carrying on commerce with the Indian nations and tribes, and in the regulation of commerce between the states, and in the exercise of the duties of the federal government as guardian of the Indian tribes and nations through which these companies were empowered to construct and operate a railroad, and that by reason of being such governmental agency or instrumentality, complainants, as well as their property, are exempt from liability for the special assessments complained of.

Second. That if complainants' property were permitted to be sold for the non-payment of the taxes complained of, it would segregate a portion of complainants' right-of-way and station grounds, and attach a lien thereto, and that such segregation of a portion of the property would be contrary to and destructive of the purpose of the grant of Congress to complainants and would interfere with complain-

ants carrying out the objects and purposes of Congress as set forth in the acts referred to.

Third. That there was no legal plat or subdivision of complainants' property made or recorded, subdividing complainants' property into blocks or quarter block districts by which the particular portion of complainants' property which might be sold by virtue of the lien of the assessments, could be definitely ascertained and determined.

The opinion of the trial judge (Rec., pp. 110-111) is based apparently on the first and second objections noted and no reference is made to the third.

FIRST PROPOSITION.

Complainants' property is not exempt from taxation or assessment by local authorities because complainants may, to some extent, be a federal agency and engaged in carrying out certain policies and purposes on behalf of the Government.

It would be useless to attempt to review or even refer to all the decisions of the courts of last resort on this question. This is a tax levied upon a specific piece of property belonging to the complainants, or in which the complainants have an interest, and not a tax on complainants' right to do business or on their franchise.

The distinction contended for is clearly set forth in many decisions of the Supreme Court. It is clearly expressed in *Railroad Company v. Peniston*, 18

Wallace 5. The Union Pacific Railroad Company, chartered by Act of Congress, July 1, 1862, under an act entitled: "An Act to aid in the construction of a railroad and telegraph line from the Mississippi River to the Pacific Ocean, and to secure the Government the use of the same for postal, military and other purposes," claimed exemption from taxes assessed by the State of Nebraska on the ground that the railroad company was a federal agency, by virtue of its charter and the purposes and objects sought to be attained pursuant to the powers granted by Congress to the corporation. Paragraph One of the syllabus in that case is as follows:

"The exemption of agencies of the federal government from taxation by the states, is dependent not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states. A tax upon their operations being a direct obstruction to the exercise of federal powers, may not be."

Paragraph 2 of the syllabus is as follows:

"This doctrine applies to the case of a tax by a state upon the real and personal property,

as distinguished from its franchise, of the Union Pacific Railroad Company, a corporation chartered by Congress for private gain, and all whose stock was owned by individuals, but which Congress assisted by donations and loans, of whose board of directors the government appoints two, which makes annual reports to the government, whose operations in laying, constructing, and working its railroad and telegraph lines, as well as its rates of toll, are subject to regulations imposed by its charter, and to such further regulations as Congress may hereafter make; on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, Congress may assume the control and management, thereof, and devote the income to the use of the United States; the loan of the United States to which, amounting to many millions, is a lien on all the property, and on failure to redeem which loan, the Secretary of the Treasury is authorized to take possession of the road with all its rights, functions, immunities, and appurtenances, for the use and benefit of the United States; and, finally, where all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government shall have the preference at rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to which control, and the obli-

gations and liabilities of the company, Congress, not forbidding a state tax, reserves the right to add to, alter, amend, or repeal the charter."

In the opinion of the above case, on page 37, the court says:

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exercise and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of the United States mail, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is in interference with the exercise of any powers belonging to the general government, and if it is not, it is prohibited by no constitutional implication."

To the same effect is *Thompson v. Union Pacific Railway Company*, 9 Wallace 579.

To the same effect is *Central Pacific Railroad Company v. California*, 162 U. S. 91. Chief Justice FULLER in this case refers to and reaffirms the rule laid down in *Railroad Company v. Peniston*, 18 Wallace 5, and *Thompson v. Union Pacific*, 9 Wallace 579, and quotes the following (p. 119) from *Railroad Company v. Peniston*, *supra*:

“It cannot be that a state tax which remotely affects the efficient exercise of a federal power, is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons, or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which the federal tax may be laid. The states are, and they must ever be co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.”

The doctrine in *Railroad Company v. Peniston* was referred to with approval in *Western Union Telegraph Company v. Moss*, 125 U. S. 530, and in *Reagan v. Mercantile Trust Co.*, 154 U. S. 413-416. *Thomas v. Gay*, 169 U. S. 264, is also in point. That case was brought to restrain the collection of taxes assessed against cattle owned by non-residents of Oklahoma Territory, and being grazed in the Osage Nation. It was contended among other things that the taxation of cattle located for grazing purposes upon the reservation, under leases duly authorized by Act of Congress, was a violation of the rights of the Indians, and an invasion of the jurisdiction and control of the United States over them and their lands. As to this contention the court said (page 273):

“As to that portion of the argument which

claims that even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & Northern Railway v. Fisher*, 116 U. S. 28, and *Maricopa & Phoenix Railroad v. Arizona*, 156 U. S. 347, in which it was held that the property of the railway company traversing Indian reservations are subject to taxation by the States and Territories in which such reservations are located.

“But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights in the property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a Tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed or could be changed by the legislature of Oklahoma at its pleasure, the value of the land for such purposes would fluctuate, or be destroyed altogether according to such conditions.

“But it is obvious that a tax upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *Erie Railroad v. Pennsylvania*, 158 U. S. 431. There the State of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that State, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a

reference to the amount of tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw the burden on the carrying company, and thus in effect become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, where a tax imposed by the State of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two states was contended to be objectionable as constituting a burden upon interstate commerce but was held that the fact that the tax in question was to some extent affected by the amount of tolls received, and therefore might be supposed to increase the rate of tolls, and thus put a burthen on interstate commerce, it was too remote and incidental to make it a tax on the business transacted. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185.

"The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties.

"It is further contended that this tax law of the Territory of Oklahoma insofar as it affects the Indian reservations, is in conflict with the

constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or impose a servitude upon a lawful commercial intercourse with the Indians over which Congress had absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of the unoccupied lands for grazing purposes.

“The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations may be conceded; but it is not perceived that local taxation by a state or territory, of property of others than Indians would be an interference with Congressional power. It was decided in *Utah & Northern Railway v. Fisher*, 116 U. S. 28, that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the Territory of Idaho, was lawfully subject to territorial taxation, which might be enforced within the exterior boundary of the reservation by proper process. The question was similarly decided in *Maricopa & Phoenix Railroad v. Arizona Territory*, 156 U. S. 347.

“The taxes in question were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessee, and as we have heretofore said that as such a tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.”

In *Utah & Northern Railway Co. v. Fisher*, 116 U. S. 28, plaintiff incorporated under the laws of

Utah, and by Act of Congress of June 20, 1878, it was made a railway corporation not only of that territory but of Idaho and Montana also. It was granted a right of way through the Fort Hill Indian Reservation in Idaho and claimed exemption from taxation because its property was incorporated within the Indian Reservation, and that the treaty stipulation entered into by Congress with the Indians would be interfered with by the enforcement of the laws relating to taxation against the complainant. The court says in its opinion (p. 31) :

“To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indian. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by Act of Congress of July 3, 1882.

That agreement recites that the Utah & Northern Railroad Co. has applied for permission to construct a line of railway through the reservation, and that the Indians had agreed for the consideration thereafter mentioned to surrender to the United States their title to so much of the reservation and as might be necessary for legitimate and practical uses of the road. A strip of land and several parcels adjoining it, forming part of the reservation, were ceded to the United States for the consideration of \$6000, to be used by the company and its successors or assigns as a right of way and roadbed, and for depots, stations and other structures. By an act of Congress confirmatory of the agreement, the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depot, stations and other structures, was granted to the company, and its successors and assigns, upon the payment to the United States of the \$6000; and on the condition of paying any damages which the United States or the Indians, individually, or in their tribal capacity, might sustain by reason of the acts of the company or its agents or employees on account of the fires originating in the construction or operation of the road. By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was so far as necessary for the construction and working of the road and the construction and use of the buildings connected therewith, withdrawn from the reservation. The road and property thereby became subject to the laws of the territory relating to railroads as if the reservation had never existed. The very terms on

which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed."

In *Maricopa & Phoenix Railroad Co. v. Arizona Territory*, 156 U. S. 347, the syllabus is as follows:

"When Congress grants to a railway company organized under the laws of a territory, a right of way over an Indian reservation within the territory and the road is constructed entirely within the territory, that part of it within the reservation is subject to taxation by the territorial government."

In this case Congress by Act of January 17, 1887, granted to the railroad company a right of way through the Gila River reservation, which act provided that the railroad should be

"authorized, invested and empowered with the right to locate, construct, own, equip, operate, use and maintain a railway and telegraph and telephone line through the Indian reservation situated in the Territory of Arizona, known as the Gila River reservation, occupied by the Pima and Maricopa Indians.

"*Sec. 2.* A right of way one hundred feet in width through said Indian reservation is hereby granted to the said Maricopa & Phoenix Railway Co. and a strip two hundred feet in width, with a length of three thousand feet, in addition to said right of way, is granted for stations for each ten miles of road, no portion of which shall be sold or leased by the company; with the right to use such additional ground where there are

heavy cuts or fills as may be necessary for the construction and maintenance of the road, but not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill, * * * * and provided further that before any such lands shall be taken for the purposes aforesaid, the consent of the Indians thereto shall be obtained in a manner satisfactory to the President of the United States.

"It is insisted that the Territory is without authority under its organic act to extend its taxing power beyond its limits and over a reservation created by act of Congress, and that it has undertaken to do so, either directly, or by including the value of the property within the reservation in its general estimate of the amount for which the company ought to be assessed. This claim, we think, presents a question within our appellate jurisdiction. *Clayton v. Utah*, 132 U. S. 632. It is clear that such issues as involve the regularity of the tax, the sum of the penalties due, the extent of the lien given by the territorial law, etc., do not present any question of the exercise of authority under laws of the United States. *Linford v. Ellison*, 155 U. S. 503. It is conceded that there was no treaty with the Indians for whose benefit the reservation was established, limiting the power of Congress to grant to the railroad the rights conveyed. The consent of Congress to the railroad's entering on the land and using it, as therein provided, was, then, a valid exercise of power. Its necessary effect was, to the extent of the grant and for the purposes thereof to withdraw the land from the operation of the prior act of reservation. And the immediate consequence of such

withdrawal, so far as it affected the property and rights withdrawn, was to re-establish the full sway and dominion of the territorial authority. *Utah & Northern Railway v. Fisher*, 116 U. S. 28; *Harkness v. Hyde*, 98 U. S. 476.

“There is no force in the contention that, because the consent of the Indians, to be given in a manner satisfactory to the President, was a condition attached to the grant, and it does not appear by the record that such consent was given, therefore the rights admittedly enjoyed by the corporation are to be treated as if obtained without the Indians’ consent.

“In the first place, as the company has taken the rights granted by the statute, the legal presumption of duty performed (*omnia rite*, etc.) requires us to assume that the consent was given in accordance with law. And again, the company having assumed and exercised rights which it could possess only by virtue of such consent, cannot be permitted to aver its own wrongdoing, trespassing, and violation of the statute in order to escape its just share of the burden of taxation.

“It is wholly immaterial whether the rights vested in the corporation by the act of Congress were rights of ownership or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant, and came, to the extent of their withdrawal, under the jurisdiction of the territorial authority.”

SECOND PROPOSITION.

Appellants' second proposition as found on page 21 of their brief, is as follows:

"Were the proceedings to make and enforce the assessments such as to afford due process of law?

"It took years for appellants to discover that an assessment against their premises was claimed, (98), and we think that it was void for uncertainty. A sufficient record of said inclusion proceedings was not made, and the record did not so identify the property sought to be charged as to constitute due process of law."

As before stated, here for the first time in this litigation is the question raised that the proceedings complained of did not constitute due process of law, and under the settled rule that only such questions as were raised in the court below will be considered here, except jurisdictional questions, we might dismiss this proposition without further comment.

But we cannot permit the statement in counsel's brief that it took years for appellants to discover that an assessment against their premises was claimed, to go unchallenged. Let us see what the record shows.

Paragraph No. 18 of the agreed statement of facts (Rec., 75) is as follows:

"The complainants had full knowledge of the commencement and of the progress and completion of said work of improvement of and along said Oklahoma Avenue."

The trial court did not mention this objection in the opinion, and we think a brief examination of the record will dispose of the same against complainants' claim.

Finding No. 8 of the Agreed Statement of Facts (Rec., p. 72) is as follows:

"8. Under and by virtue of the Act of the Legislature of the State of Oklahoma, mentioned in complainants' bill of complaint herein, it is provided, among other things, that,

'If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment, as herein provided'."

Finding No. 9 (Rec., p. 72):

"9 That portion of complainants' right-of-way, railway yards and station grounds, abutting as aforesaid on said Oklahoma Avenue throughout the length thereof, from the point of intersection of the northeasterly boundary line of said right-of-way and station grounds of the complainants and the southeasterly boundary line of the right-of-way and station grounds of the St. Louis and San Francisco Railroad Company, and lying between said Oklahoma and Chectaw Avenues, had not been platted into lots and blocks, and the Mayor and Council of said City of Holdenville on June 29, 1910, by motion, adopted a map, a copy of which is hereto attached, marked 'Exhibit C.' That the minutes of said City Council with reference to said map are as follows:

'City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.

'Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.

'Upon a vote of "aye" by roll call the following vote was recorded. Those voting "aye," Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting "nay," none. Absent, Cornish, Nix.

'Motion declared carried and map adopted.'

"That on the original of said map the lines, showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$, $78\frac{1}{2}$, and the dollar signs followed by figures appearing therein, are in pencil and attached thereto are certain affidavits and endorsement, copies of which are attached to said exhibit; that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the City of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of subdividing said right-of-way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements."

Finding No. 10 (Rec., p. 73), and Findings Nos 12, 13, and 14 (Rec., p. 74), refer to the plat subdividing complainants' property and to the assessment against the same.

With reference to this map and the adoption thereof F. P. Rutherford, who was mayor of the City of Holdenville at that time, says (Rec., p. 100):

"I was mayor of the City of Holdenville during the proceedings for the paving of street improvement district No. 1. I remember about the adoption of a map, subdividing the Rock Island right-of-way and station grounds into quarter blocks. I have that map with me. The map is identified and offered and admitted as 'Defendants' Exhibit A'; that is the map showing the platting of the railroad right-of-way and station grounds for assessment purposes. The map was adopted on June 29, 1910, and filed with the city clerk. It was filed the night it was adopted: was turned over to his possession and retained like all other documents. By filing I mean it was placed in his care and keeping. There was no file mark of record made on it that I know of. I did not do that personally. I was right in council meeting the night it was adopted and turned over with all other papers.

(Witness' statement that it was filed with the clerk was ordered stricken by the trial judge. Remainder of his testimony as to details permitted to remain in the record.)

"That map remained in the city clerk's office with the files during the proceedings until after the assessing ordinance was passed in

August. I don't know how much longer after that."

Again (Rec., p. 101), Rutherford testifies:

"I remember a representative of the Rock Island Railroad calling on me during the summer of 1910 during the progress of these proceedings on more than one occasion. The Rock Island representative would call in. Once he and the clerk came into my place of business to see about the assessing ordinance after the assessing ordinance had been passed. * * * The records of the City were open to his inspection. I remember a representative of the Rock Island receiving a copy of the assessment ordinance. I don't remember when it was any more but it was after the publication. The circumstance that I do remember is, that he and Mr. Draper, who was the city clerk, came into my place of business with a copy of the paper which carried this publication of the assessment ordinance and we were discussing it there in my store and he was rather criticising us for paying too much for the paving. He said he thought it ought to have been done cheaper than that, and that their Rock Island engineer said it could be done for a less price. I don't remember the figures. His conclusion was, we were paying too dearly for the paving. He had a copy of the paper containing the assessing ordinance that showed the amount of the assessment against the Rock Island Company."

To the same effect is the testimony of I. O. Draper, city clerk, who testifies (Rec., p. 104):

"I have seen the map which has been identified as 'Defendants' Exhibit A,' before. It

was adopted June 29, 1910, by the Mayor and Council. After its adoption it was filed in my office. It remained in my office as city clerk all the time from its adoption until it was given to Gilkerson & Leavy to be sent to Spitzer, Rorick & Company. That map was not in the transcript of proceedings that I sent to Spitzer, Rorick & Company. I don't remember just when he did send it to Spitzer, Rorick & Company. I don't remember just how long that map remained in my office. There was a map in the city engineer's office showing this paving district; it was a large map tacked up on the wall over his drafting table. I went over that map with a representative of the Rock Island Railroad. * * * Then I also went over it with an engineer that they sent there. He pretended to represent the Rock Island as one of the assistant attorneys. He was there to obtain information. I went over that map with those people and showed them this paving district several times. * * * We talked about the assessment, went over the records, went over to the print shop and got a paper. I went with this representative of the Rock Island; we got a copy of the paper at the print shop containing the assessing ordinance. We then went to Mr. Rutherford's store. We talked there, and Mr. Rutherford told both of us he thought the paving pretty high; that their engineer said it could be done cheaper. We had a copy of the assessing ordinance before us at that time."

It will be seen from this testimony, which is undisputed, that the Mayor and Council did by resolution adopt a map or plat dividing complainants' property into quarter block districts for the purpose of making these assessments.

It is to be noted that our statute (Sec. 724, Appendix) doesn't provide any method for subdividing this property for purpose of assessment. There is no law or ordinance requiring the adoption or filing or recording of any map or plat, and in the absence of any such requirement we think the subdivision of this property by any means which would make the property assessed sufficiently definite and certain to advise complainants as to what part of their property was assessed and the amount of the assessments would be all that could be required. The statute reads:

“If any portion of the property abutting upon such improvement shall not be platted into lots and blocks the Mayor and Council shall include such property in proper quarter block districts for the purpose of appraisement and assessment as herein provided.”

The blocks in the City of Holdenville on each side of the complainants' station grounds are 300 feet square; the right-of-way and station grounds are 300 feet wide. In adopting the plat and subdividing this property into quarter blocks as will be noticed from Exhibit “C” (Rec., between pages 78-79) the streets were considered as extending across the right-of-way and station grounds, and the right-of-way and station grounds of complainants abutting or adjacent to Oklahoma Avenue were subdivided into blocks designated as blocks $33\frac{1}{2}$, $44\frac{1}{2}$, $52\frac{1}{2}$, $68\frac{1}{2}$ and $78\frac{1}{2}$, and assessments laid against the quar-

ter blocks abutting on that portion of Oklahoma Avenue improved.

Now, it is undisputed that the representative of the Rock Island Railway was shown these maps, the one adopted as well as the larger map on the wall of the city engineer's office; that he was furnished with a copy of the assessment ordinance very soon after its passage showing the amount assessed against complainants' property.

We think, therefore, it must be found as a fact that complainants knew at all times what part of their property was assessed and the amount of the assessments. In fact, the stipulation recites, that complainants had full knowledge of the proceedings relating to these assessments. If they did, they certainly were not injured by reason of the fact that the plat subdividing their property into quarter blocks adopted by the Council June 29, 1910, was at a later date and after the passage of the assessment ordinance, by inadvertence sent to the bond buyers with a transcript of the proceedings. Knowing, as they did, and as they were bound to know under the law of Oklahoma, that their property was subject to assessment, that the cost of these improvements would be taxed against the abutting property, and having knowledge through their representatives that the cost of these improvements was so assessed against their property, as well as against the property on the other side of Oklahoma Avenue, they can not now complain that the plat which was adopted

was not formally filed for record in the office of the register of deeds or some other public office, and recorded. There is no statute requiring any such record.

Even though it be conceded that complainants' property was not subdivided or designated with sufficient particularity of description to enable complainants to tell what portion of their property was assessed, it would not relieve complainants from their proper portion of the expense of this improvement, as in that event it would be the duty of the Mayor and Council to make a re-assessment containing proper description or designation of complainants' property. The Oklahoma statute (Sec. 728, Appendix), provides as follows:

"Sec. 728. *Suits.*—No suit shall be sustained to set aside any such assessment, or to enjoin the Mayor and Council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payments as herein authorized, or contesting the validity thereof on any ground or for any reason other than for the failure of the City Council to adopt and publish the preliminary resolution provided for in section two (723) in cases requiring such resolution and its publication and to give the notice of the hearing on the return of the appraisers provided for in section five (726) unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment: *Provided*, that in the event that any special assessment shall be found to be invalid or insuf-

ficient in whole or in part for any reason whatsoever, the City Council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment (L. 1907-8, p. 176)."

That a re-assessment would be the proper method to correct such an error will be noted from the language of the Supreme Court of Oklahoma in *Oklahoma Railway Company v. Severns*, 170 Pac. 216-220, not yet officially reported (251 U. S. 104). Here the court says:

"It is suggested by counsel that this court should determine by what description a tract of land in controversy should be assessed, that is, whether as a lot, quarter block, or irregular tract. This question is not properly within the issues presented on the record. It does not appear to have been presented to the trial court. The contention made by plaintiff below was that the assessment was invalid for the reason that the property was not accurately described. The decree of the trial court sustains this contention and commands the city authorities to re-assess this private right-of-way by proper description and to take such steps as may be necessary to properly assess such property. The decree does not direct the commissioners as to the description."

This procedure was approved and the action of the trial court affirmed.

Under the proviso of Section 728, above quoted, it is the duty of the City Council in case any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, to make a re-assessment which shall have the same force and effect as an original assessment.

It is not claimed that the statute under which these assessments were levied does not afford due process of law.

It is claimed that the proceedings had and taken by the Mayor and Council of the City of Holdenville to make and enforce the assessments were not such as to afford due process of law .

(See Second Specification of error, Appellants' Brief, pages 12 and 21)

In other words, the objection as to want of due process of law goes to the manner and method of conducting these proceedings, and not to the statute itself.

We think it well settled that the constitutionality of the law is to be decided, not by what was done under it, not by the kind or character of the notice which in fact was given, not by the question whether or not the notice given was in compliance with the statute, but whether or not the notice provided for in the statute when given in compliance with the statute, violates any constitutional provision.

In other words, if the notice required and provided for by the statute is such notice as would fur-

nish due process of law, then the act is subject to no constitutional objection and this court cannot pass on the validity of these proceedings regardless of whether or not the notice given was sufficient or was in accordance with the requirements of the statute. *Davidson v. New Orleans*, 96 U. S. 97.

In the above case the court says:

“The objections raised in the state courts to the assessments were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And, although counsel for the plaintiff in error concede in the first sentence of their brief, that the only Federal question is, whether the judgment is not in violation of the provision of the Constitution which declares that ‘no state shall deprive any person of life, liberty, or property, without due process of law,’ the argument seems to suppose that this court can correct any other error which may be found in this record.

1. It is said that the legislature had no right to organize a private corporation to do the work, and, by statute, to fix the price at which the work should be done.

2. That the price so fixed is exorbitant.

3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasurer.

Can it be necessary to say, that if the work was one which the state had authority to do, and to pay for it by assessments on the property in-

terested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States."

Again on page 104, the court says:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

See also Dillon on Municipal Corporations, Vol. 4, Sec. 1365, 5th edition.

It will be noticed that the statute of Oklahoma under which these assessments were levied provides for the publication of two notices. Sec. 723 (See Appendix) provides that when the Mayor and Council deem it necessary to improve a street for which a special tax is to be levied, they shall by resolution declare such improvement to be necessary, and shall publish such resolution in six consecutive issues of a daily newspaper, or two consecutive issues of a weekly paper, and if the owners of more than one-half in area of the land liable to assessment to pay

for such improvement shall not within fifteen days after the last publication of the resolution file with the City Clerk their protest against the improvement, the Mayor and Council shall have power to proceed with the improvement.

Section 726 provides that after the appraisers have filed their report appraising the cost of improvement according to the benefits to the several lots and tracts of land in the improvement district, the Mayor and Council shall appoint a time for holding a session on some date to be fixed by them, to hear complaints or objections concerning the appraisement and apportionment as to any such lots or tracts of land, and notice of such session shall be published by the city clerk in five consecutive issues of a daily newspaper, or two issues of a weekly newspaper, and the time fixed for said hearing shall not be less than five, nor more than ten days from the last publication. The Mayor and Council at said session shall have the power to review and correct said appraisement and apportionment, and to raise or lower the same as to any lots or tracts of land, as they deem just, and shall by resolution confirm the same as so revised and corrected by them. Assessments shall be made in conformity with the appraisement as revised and corrected by the Council.

It will be noticed that after the report of the appraisers had been filed and the amounts which have been assessed in the judgment of the appraisers against the particular lots and tracts of land has

been determined, the statute says that a time and place shall be appointed for a hearing "and notice of such session shall be published by the city clerk. The statute does not prescribe the form of notice, nor to whom, if any one, it may be directed, but specifically provides for notice of the meeting to be published.

The form of notice published in the instant case is set forth in paragraph 15 of complainants' bill (Rec., p. 14.)

Statutes of this character have been so often held in objection in constitutional courts, that we deem it sufficient to cite only a few of the decisions on this (see Dillon on Municipal Corporations, Vol. 4, Sec. 1365, 5th Edition.)

Construction by said courts of the statute provided for the imposition of taxes, giving to the taxpayers the right to appear before the assessing board and to be heard was held to be conclusive by the Federal Court. *Pittsburg C. C. & L. R. Co. v. Beckous*, 154 U. S. 421-426. Notice of publication has been held to be sufficient in many cases.

—*French v. Barber Asphalt Pav. Co.*, 181 U. S. 324;

Hagar v. Reclamation Dist., 111 U. S. 70;

Lent v. Tillson, 140 U. S. 316, 72 Calif. 40, 14 Pac. 71;

Paulson v. City of Portland, 149 U. S. 30-41;

Winona & St. P. Land Co. v. Minnesota, 111 U. S. 526-537;

Glidden v. Harrington, 139 U. S. 255;

Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314-318;
Gilmore v. Hentig, 33 Kan. 156-170.

It is further held that personal notice to the property owner either by name or otherwise, is not necessary to constitute due process of law in levying assessments for local improvements, the proceeding being in the nature of a proceeding *in rem*.

—*Gilmore v. Hentig*, 33 Kans. 156;
Ballard v. Hunter, 204 U. S. 241;
Huling v. Kaw Valley Ry., 130 U. S. 559;
C. C. C. & St. L. Ry. v. Porter, 210 U. S. 177;
Bouris v. Pittsburg Plate Glass Co., 163 Ind. 599, 71 N. E. 249;
Alley v. City of Muskogee, (Okla.) 156 Pac. 315.

It is further held that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, provides due process of law.

—*McMillan v. Anderson*, 95 U. S. 37;
Lent v. Tulson, 140 U. S. 316;
Security Trust & S. F. Co. v. City of Lexington, 203 U. S. 223;
Page & Jones on Taxation by Assessment,
Section 133.

This precise question was before the Supreme Court of Oklahoma in *Alley v. City of Muskogee*, 156 Pac. 315.

Discussing this question the Supreme Court of Oklahoma says:

“Plaintiff's legal rights, as the owner of lots abutting on one of the streets sought to be improved, were not unconstitutionally impaired for failure on the part of the mayor and city council to give him personal notice of the action of the city council when having under consideration the resolution of necessity or of its subsequent passage. Neither was it necessary to give said plaintiff and other owners of lots personal notice of the action of the board of appraisers, or of the hearing to be had thereon. The provisions of the statute authorizing notice by publication were sufficient. Construing the provision of the drainage statute, in regard to notice to property owners of the district (Section 3052, Comp. Laws 1909), it was said in *Davis v. Board of Commissioners*, 137 Pac. 114:

“The statute in the case at bar provides for service of notice by publication, but does not provide for personal service of such notice; and it is alleged in the petition that no personal notice was served. But the absence of provision for personal notice in the statute and the failure to give personal notice does not render the statute invalid and does not result in the proceeding denying to the property owners due process of law, for some other form of notice is provided and given, which fairly and reasonably apprises the property owners of the proceeding to assess their property and gives them an opportunity to be heard upon the merits of their objections to the assessment. Where the statute provides for notice by publication, that accomplishes the purpose, and it is not void as being in violation of the constitutional provision which

prohibits the taking of property without due process of law'—citing *Bellingham Bay & British Columbia R. Co. v. New Whatcom*, 172 U. S. 314 19 Sup. Ct. 205, 43 L. Ed. 460; *Wright v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461; *Ritter v. Drainage District No. 1*, 78 Ark. 580, 94 S. W. 711; *Taxation by Assessment*, Page & Jones, Sec. 121.

"In the earlier case of *Riley v. Carico*, 27 Okla. 33, 110 Pac. 738, it was held that notice by publication of an intention to form a drainage district consisting of two consecutive insertions in a newspaper of general circulation in the county in which the land was located, was sufficient to constitute due process of law, and was not repugnant to Section 24, Art. 2, of the Constitution. Such we understand to be the general rule in the giving of notices of special assessment proceedings. As said by Page & Jones, *Taxation by Assessment*, Sec. 760:

'The property owner has no constitutional right to personal service. If the statute provides for a service by publication of such a sort as fairly to amount to constructive service, and publication is had in compliance with the terms of the statute, the property owner receives sufficient notice and cannot attack the assessment proceedings on the ground of want of notice. If by the statute service by publication is specifically provided for, such service must ordinarily be made.'

"In neither the resolution or the notice, given by the City Clerk, is it necessary that the

property owners be named. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71; *Williams v. Vicelich*, 121 Cal. 314, 53 Pac. 807; *City of Ottawa v. Macy* 20 Ill. 413; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Huling v. Kaw Valley R. & I. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045.

“It is said in *Page & Jones. Taxation by Assessment*, Sec. 751:

‘In the absence of a statute specifically requiring it, it is not necessary that a notice be given to the property owners by name. It may be addressed generally to the owners of land designated in a certain manner; as the owners of land abutting upon a specified part of the designated street; or to the property owners in sidewalk district No. 6.’

“Mr. Elliott, in his work on *Roads and Streets* (2nd ed.), Sec. 324, says:

‘The form of the notice is not important unless the statute expressly prescribes a particular form, but the substance of the notice must, in all essential features, be such as the statute requires.’

“So, in *Wilson v. Inhabitants of the City of Trenton*, 53 N. J. Law 645, 23 Atl. 278, 279, 16 L. R. A. 200, the court says:

‘The legislature may prescribe how such a notice may be given. The mode prescribed must be strictly followed and the proceedings must show the prescribed notice.’

“What notice should be given, and the manner in which it shall be given, are matters with in legislative discretion, and the court cannot inquire as to the reason which prompted its ac-

tion, or do less than to require an observance of its mandates, unless contrary to the fundamental law."

Public Policy Under Oklahoma Statutes.

Now, what is the policy with reference to taxation, including levying of special assessments for local improvements, as expressed by the Constitution and laws of Oklahoma, and construed by the Supreme Court of this State? Our Constitution provides "the legislature shall pass no law exempting any property within this State from taxation, except as otherwise provided in this Constitution." (Section 50, Article 5.) Again, "the legislature may authorize County and municipal corporations to levy and collect assessments for local improvements upon property benefitted thereby, homesteads included, without regard to cash valuation." (Section 7, Article 10.) Also: "The rolling stock and other movable property belonging to any railroad, transportation, transmission, or other public service corporation in this State shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals; and the legislature shall pass no laws exempting any such property from execution and sale." (Section 7, Article 9.) Section 3868. Revised Laws of 1910 provides:—

"Every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work of labor upon or furnish any

materials, machinery, fixtures or other thing towards the equipment, or to facilitate the operation of any railroad, shall have a lien therefor upon the road-bed, buildings, equipment, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, beneficiaries under trusts or owners."

Section 3870 provides that said liens shall be mentioned in the judgment rendered for the claimant in an ordinary suit for the claim, which may be enforced by ordinary levy and sale under final or other processes in law or equity. Section 14, Chapter 45, Session Laws of Oklahoma, 1910, is as follows:

"Should any railroad company fail or refuse to pay the tax required by the provisions of this act within the time herein prescribed, interest shall be computed thereon at the rate of eighteen (18) per centum per annum from the date the same became due and the state shall have the first lien upon all the assets and property of such railroad company within this state."

Section 15 provides:

"Should any tax levied for state purposes under the provisions of this act become delinquent, the State Auditor may issue a tax warrant, directed to the sheriff of any county in this state, where any property of such delinquent railroad company may be found, and the sheriff receiving such tax warrant shall proceed to levy

the same upon the property of such delinquent railroad company in like manner as on execution. Should any tax levy for county, city, town, township or school district purposes, under the provisions of this act, become delinquent, the county treasurer of the county wherein such tax is delinquent, may issue a tax warrant directed to the sheriff of his county, who shall proceed to levy the same upon the property of such delinquent railroad company in like manner as on execution ”

Judge Dillon, on Municipal Corporations, Section 1451, summarizes the decisions on this question as follows :

“SEC. 1451. *Special Assessments against Railroad Property.*—According to the view very generally had, land occupied and used by railroad companies for road-beds, depots, freight houses, and other corporate purposes, whether the company be owner of the fee or has only an easement or qualified right therein, is to be regarded as real estate, which may be subjected by the legislature to special assessment for the opening, paving, and grading of streets and for other local improvements in the same manner as the real property of private individuals. But this view is not uniformly accepted. Thus, in some jurisdictions it is held that a railroad is, in contemplation of law, a public highway; that it is therefore property devoted to public use, and comes within the general rule that a special assessment cannot be imposed upon public property, *unless the legislature has expressly authorized such an assessment to be made.* In other jurisdictions where special benefits are considered as absolutely essential to the power of the

legislature to authorize special assessments, the decisions hold that land occupied as a roadbed or right-of-way, (as distinguished from station depots, depot grounds, freight houses, etc.,) being permanently held and applied to use as right of way, in contemplation of law, cannot possibly be benefitted by the improvement of street adjoining or contiguous thereto, and that therefore, the essential requisites for a special assessment do not exist, and it cannot be imposed. In other jurisdictions the courts hold that benefit to the property for its present use is the proper basis of assessment, and that such benefit must be established as a fact before the assessment can be sustained."

The constitutional declaration that railways and highways and common carriers, does not exempt land of a railroad used for depot and yard purposes from a special tax for street improvements.

—*City of Nevada v. Eddy* (Mo.) 27 S. W. 47

Unless expressly exempt, the property of a railway company is usually held liable for special assessments.

—28 Cyc 1133.

Section 1 of our Paving Act being Section 724 Compiled Laws of 1909, provides for the enforcement of lien against railroad, in District Court.

From Section 3 of the Paving Act of April 1 1908, (being Section 724, Compiled Laws of 1909), it appears that the legislature intended that lots and pieces or parcels of land fronting or abutting upon

any such improvement, should bear the burden of the expense thereof, to the center of the block where the abutting way is on the exterior of the block, and to the exterior where any improvements are made on any alley or other public way in the interior of the block.

It will therefore be seen that the doctrine which obtains in some states that it is against public policy to permit the right of way of a railway company to be segregated and sold for local assessments, does not obtain in this state, and that there is no public policy as indicated by Constitutional provisions and legislative enactments in the State of Oklahoma, denying the right of levying special assessments against the right of way of station grounds of railway companies.

See:

Oklahoma City v. Shields, 22 Okla. 298;
M. K. & T. Ry. Co. v. City of Tulsa, 45 Okla.
382, 145 Pac. 398;
Oklahoma Ry. Co. v. Severns Paving Co.
(Okla.) 170 Pac. 216.

In *Oklahoma Railway Company v. Severns Paving Company*, *supra*, it is expressly held that a right of way of a railway company is subject to assessment for street improvements and that the proper method of assessing the same is to subdivide the same in quarter block districts where the same has not been platted into lots and blocks.

Paragraph 4 of the syllabus in that case is as follows:

"A tract of land 40 feet in width along the center of the City Boulevard, and from which the general public are excluded by a six-inch curbing, the title to which the railway company holds by a voluntary conveyance purporting to convey the fee, is a 'lot, piece or parcel' of land fronting and abutting upon the boulevard, within the meaning of the statute (Compiled Laws 1909, Sec. 724) and subject to assessment for the cost of paving said boulevard."

Paragraph 2 of the syllabus in said case:

"Under Section 7, Article 9 of the Constitution, all real and personal property, or any part thereof, belonging to public service corporations, including street railways, is liable to execution and sale in the same manner as the property of individuals."

As to the enforcement of liens of mechanics, laborers, and artisans, see *K. C. S. Ry. Co. v. Tansey*, 41 Okla. 543, 139 Pac. 267.

Both the Constitution and statutes of Oklahoma confer such authority, and the public policy as declared by its Constitution and statutes has adopted the rule that no property of whatever character is exempt from special assessments for local improvements. The property owned by the City—by the County—and by the School Board—are all expressly made liable for the just proportion of the cost of local improvements, as well as the property of a railway company.

The authorities already cited and quoted from, including the Supreme Court of the United States, show that the question of taxation, the expense proposed, and method of collection, including local improvements, are matters of state, or local law or policy, not to be interfered with by the Federal Courts unless in violation of some Federal law.

We cannot define the policy of our state law on this point better than to quote from the opinion of our Supreme Court in *M. K. & T. Railway Co. v. City of Tulsa*, 45 Okla. 382-395, where our court quotes with approval from the opinion in *L. & M. Ry. Co. v. Barber Asphalt Paving Company*, 116 Ky. 856, 76 S. W. 1097, which case was later affirmed by the Supreme Court of the United States in 197 U. S. 436:

“It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, that is its right of way. The railroad company has been in possession of the strip of land in question for 50 years. * * * It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. * * * Under the statute covering street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or

nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot within the meaning of the statute, and to thus appropriate it can not change its character''

THIRD PROPOSITION.

**Complainants' Property Is Subject to Assessment
Although Their Title Is Not in Fee but a
Mere Easement for Railway Purposes.**

Complainants object to these assessments on the grounds that the fee of the land assessed is in the Creek Nation and that complainants have a mere easement for railway purposes. Grant this to be true, it does not exempt the interest which complainants have in this property from liability for the payment of its proper portion of improving this street. This property is now a part of an interstate railway, a trunk line, we might say, being the only line of railway extending east and west through the State of Oklahoma and running from Memphis, Tennessee, through Arkansas, Oklahoma, and Texas to Tucumcari, New Mexico, and there connecting with the main line of the Rock Island extending from Chicago to the Pacific coast with connections at El Paso. It is inconceivable that any reverter of this land to the Creek Nation could ever occur. For all practical purposes complainants are the owners of this prop-

erty. They assert such title, and evidently expect to retain this property for railway purposes indefinitely as the Choctaw, Oklahoma & Gulf, as lessor, and Chicago, Rock Island & Pacific, as lessee, have entered into a contract for the operation of the railway over this property for a period of 999 years (Rec., p. 87). Technically, the fee to this ground may be in the Creek Nation; it probably is; for all practical purposes and substantially, complainants are the absolute owners of this property for the purposes for which they hold possession.

These lands were expressly reserved from allotment under the treaties entered into by the Government with the Creek Nation, providing for the allotment of lands to members of the tribe. By section 2 of the Creek treaty approved March 1, 1901 (31 Stat. L. 861), it is provided:

“All lands belonging to the Creek Tribe of Indians in the Indian Territory, except town-sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value,” etc.

By the second treaty, or what is known as the Supplemental Creek Agreement, approved June 30, 1902, (22 Stat. L. 500), section 2 of the first treaty is amended to read as follows:

“2. Section 2 of the agreement ratified by Act of Congress of March 1, 1901 (31 Stat. L. 861), is amended and as so amended is re-enacted to read as follows: ‘All lands belonging to the

Creek Tribe of Indians in the Indian Territory, except townsites and lands reserved for Creek schools and churches, railroads, and town cemeteries, in accordance with the provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861) shall be appraised at not to exceed \$6.50 per acre," etc.

Under the scheme of allotment no land could be selected that was not appraised, as the amount of land selected was based on its appraised value. It will be noted, therefore, that lands reserved for railroads were excluded from the scheme of allotment.

In *Maricopa & Phoenix Railroad Company v. Arizona Territory*, 156 U. S. 347-352, discussing the power of the territory to assess railroad property located on an Indian reservation for which Congress had granted a right-of-way, the court speaking through Mr. Justice WHITE says:

"It is wholly immaterial whether the rights vested in the corporation by the Act of Congress were rights of ownership or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant and came to the extent of their withdrawal under the jurisdiction of the Territorial authority. The fact that Congress reserved the power to alter, amend or repeal the statute in no way affected the authority of the Territory over the rights granted, although the duration of that authority may depend on the exercise by Congress of the rights reserved."

In *Chicago and N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437, it is held that an act recognizing the right to sell a portion of a railroad right of way to enforce a general tax, and providing that special assessments may be enforced in the same manner as general taxes, authorized a sale of a portion of the railroad right of way to satisfy a special assessment for paving. An easement of a right of way over a lot may, if benefitted, be assessed for the improvement of the street.

In *Pick v. City of Chicago*, 38 N. E. 255, it is held that the railroad right of way in a public street is "property" within the meaning of the statute authorizing the cost of local improvements to be assessed on contiguous property. We have heretofore quoted from pages 260 and 261 of this case.

In *Northern Pacific Railroad Co. v. Richland County*, 148 N. W. 545, L. R. A. 1915-A, 129, it is held specifically that a railroad right of way, if actually benefitted, may be assessed for a local drain which is constructed under the provisions of the Dakota statute, irrespective of the fact whether the fee is in the railroad company or not.

It was contended in that case that special assessments for local improvements cannot be made against a right of way or easement of a railroad company and a sale could not be made to enforce the lien against a fragmentary portion of the roadbed of a railway or public service corporation. This conten-

tion of the railroad company was rejected and the assessment upheld.

Judge Dillon, in his work on Municipal Corporations, Sec. 1451, lays down the rule as follows:

“According to the view generally had, land occupied and used by railroad companies for roadbeds, depots, freight houses and other corporate purposes, *whether the company be the owner of the fee or has only an easement or qualified right therein*, is to be regarded as real estate which may be subjected by the legislature to special assessment for the opening, paving and grading of streets and for other local improvements in the same manner as the real property of private individuals; but this view is not uniformly acknowledged, thus in some jurisdictions it is held that a railroad is, in contemplation of law, a public highway; that it is, therefore, property devoted to public use and comes within the general rule that a special assessment cannot be imposed upon public property unless *the legislature has expressly authorized such an assessment to be made*” (Italics ours.)

In *Louisville & Nashville Railroad Co. v. Barber Asphalt Company*, 197 U. S. 430, affirming the same case, 116 Ky. 856, 76 S. W. 1097, it was pleaded that the railroad's only interest in the lot was a right of way for its main roadbed, and that neither the right-of-way nor the lot did or could get any benefit from the improvement. The assessment was held valid. This affirmed the decision of the Supreme Court of

Kentucky in the same case, 116 Ky. 856, 76 S. W. 1097. The Kentucky Court in its opinion says:

"It is not the intangible right to use it, but a strip of land which the railroad company appropriates for its use and upon which it builds its roadbed, that is its right of way.

"The railroad company has been in possession of the strip of land in question for 50 years.

" * * * If this strip of land was not occupied by the railroad company as a right of way it could not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of the street improvement. * * *

" * * * Under the statute covering street improvements, a lot is any piece of land within the territory defined by the statute or the general council where the territory to be assessed is not bounded by principal streets. The use, or non-use, or the character of the use to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot within the meaning of the statute and to thus appropriate it can not change its character."

The above language, as before noted, is adopted and quoted with approval by the Supreme Court of Oklahoma in *M. K. & T. Ry. Co. v. City of Tulsa*, 45 Okla. 382-395, and must, therefore, we think be regarded as the settled law of Oklahoma.

To the same effect is *Heman Construction Company v. Wabash R. R. Co.*, 206 Mo. 172, 12 L. R. A. (N. S.) 112, 121 Am. State Rep. 649, 104 S. W. 67, 12 Ann. Cases 630.

Northern Pacific Railway Co. v. City of Seattle, (Wash.) 91 Pac. 244, 12 L. R. A. (N. S.) 121, is directly in point. It was there contended:

“That appellant only occupied its land as a right of way, not owning the fee, and that its easement is not subject to special assessments. Overruling this contention and holding the right of way subject to special assessments for the improvement of the street the court said: ‘Although the appellant may not hold the fee simple title, there is no reasonable or immediate probability that it will abandon the land, its use and easement is of but little value, if any. therefore, for all practical purposes the substantial owner. The fee simple subject to its use and easement is of but little value, if any. Except for appellant’s occupancy, no suggestions would be made that the land was not benefited by the improvement or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property can not be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement’.”

In the above case the cases for and against the doctrine of special assessments against a right of way of railroad companies are cited and the con-

clusion reached that the later doctrine by the great weight of authority holds such property liable to these assessments unless such property is clearly exempted by statute from such burdens. In the closing paragraph of the opinion the court says:

“Appellant further contends that even if it should be held that its right of way did receive some special benefit from the improvement, the assessment should not be made as no lien can be enforced therefor. It insists that there is no law in this state, nor any provision in the statute, for special assessments, which permits the lot and right of way of a public service corporation to be broken up or sold in fragments and the exercise of its franchise to be destroyed by piecemeal foreclosures and sales. The right and power to levy a special assessment upon the appellant's right of way is not in any way dependent upon the question as to whether a valid and enforceable lien can be created against its property. *Troy & L. R. Co. v. Kane*, 9 Hun. 506. We do not understand that either the collection of the assessment or the enforcement of any lien is now before us for consideration.”

To the same effect is the closing paragraph of the opinion in *Heman Construction Company v. Wabash Railroad Company*, *supra*, where the court says:

“As to the proposition urged against this lien that the roadbed or right of way of the defendant, or a part thereof, could not be sold under execution to satisfy any judgment which may be rendered in favor of plaintiff in this case, it is not necessary for us to express an opinion

at this time. What we do hold is that under the charter and ordinance the tax bill sued on in this case is a lien against that part of the right of way of the defendant company described in the tax bill. We do not feel called upon to determine how such judgment can be enforced, but it is probable that counsel will be able if necessary to accomplish such result. As a general rule 'where there is a right there is a remedy' (2 Dill. Mun. Corp., 4th Ed., Sec. 822; *McIneny v. Reed*, 23 Ia. 410; *Lima v. Lima Cemetery Assn.*, 42 O. St. 128, 51 Am. Rep. 809; *N. Y. v. Coalgate*, 12 N. Y. 140), and this case we think forms no exception to that rule."

As regards complainants' title to the land assessed we beg to invite attention to the Act of Congress of August 24, 1894. 28 St. L. 502-504, section 5:

"Said corporation when organized as hereinbefore provided, shall have and possess perpetual succession."

This is the corporation which is authorized to succeed to all the rights, privileges and franchises of the Choctaw, Coal & Railway Company, and is, in fact, the charter of the Choctaw, Oklahoma & Gulf, one of the complainants herein. It will, therefore, be noted that this corporation, the Choctaw, Oklahoma & Gulf Railroad Company, complainant, is by its charter granted perpetual possession; it is granted a right of way by the Act of Congress over this land for railway purposes and, with the approval of Congress, enters into a lease of all its

rights, privileges and franchises to the Rock Island for a period of 999 years. To all intents and purposes complainants must, therefore, be held to be the owners of this property.

Complainants come into a court of equity seeking relief. What stronger case could be found for the application of the rule laid down by Pomeroy, 2nd Ed., section 378, approved by the Supreme Court of Oklahoma in *Collier v. Bartlett*, 175 Pac. 247-250:

“Equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external forms to conceal the true purposes, objects and consequences of a transaction.”

Applying this rule, complainants, exercising acts of ownership over this property, purporting to convey and receive right to use the same for a period of 999 years, should be held to be the owners of this property to the extent that their interest in the same should bear its proper share of the burden of improving the streets adjacent to their station grounds in our first class cities in Oklahoma.

Plaintiffs Are Estopped by Their Own Laches.

A court of equity will not grant plaintiffs relief because of plaintiffs' failure to protest at any time

against the proceedings complained of and because of plaintiffs' laches in bringing this suit.

The preliminary resolution upon which the paving proceedings were based were passed January 20, 1910 (Rec., p. 8). The assessment ordinance was passed August 25, 1910 (Rec., pp. 18-19). The bill of complaint in this case was filed November 1, 1912, more than two years after the passage of the assessment ordinance. Shortly after the passage of the assessment ordinance bonds were issued to the contractor in payment for the work and are now in the hands of innocent parties. No protest of any kind was made to the City Council during the progress of the proceedings leading up to the paving of this street. No question is better settled in this State, as well as by the Federal decisions, that plaintiffs have been guilty of such laches as will deprive them of any relief in a court of equity. The rule was first announced by the Supreme Court of Oklahoma in the *City of Perry v. Davis*, 18 Okla. 427-458, as follows:

"The evidence discloses that the defendants in error stood by without objection or protest when the construction of the sewer adjacent to their property was in progress. Equity does not look with favor upon their silent and approving acquiescence of the performance of labor and expenditure of money enhancing the value of their properties when contrasted with their belligerent and warlike attitude exhibited for the first time after the full completion of the work. It was the plain duty of the defendants in error that when the publication of the ordi-

nance creating the sewer district, or when they discovered that labor and money was being expended in the actual construction of the sewer, to vigorously object and protest against it; then was an opportune time to test by injunction or other proceedings the legality of the various steps being taken; but no objection was made; no protest was filed and not a single murmur was heard in the sewer district from that November morning when the contractor and his workmen with their picks and shovels and spades went to improve the sanitary conditions of the district, in which all the defendants in error were resident property holders, to the evening when the entire work was completed according to contract, approved by the City Engineer and accepted by the City. It was not until after the completion of this work and when these defendants were called upon to pay their respective assessments for benefits received that it occurred to them that an injunction proceeding was a necessary and proper remedy to invoke. Under such circumstances, both the law and equity look with approval upon the payment of such assessments especially when made for a public work of this character."

This doctrine has been consistently followed by the Supreme Court of Oklahoma to the present time and is referred to and quoted with approval in the following opinions:

- Kerker v. Bocher*, 20 Okla. 729;
- Paulsen v. El Reno*, 22 Okla. 734;
- Weaver v. Chickasha*, 36 Okla. 226;
- Bartlesville v. Holm*, 40 Okla. 467-472;
- Terry v. Hinton*, 152 Pac. 851;

City of Chickasha v. O'Brien, 159 Pac. 282-283;
Morris v. City of Lawton, 148 Pac. 123;
Shultz v. Ritterbusch, 38 Okla. 478-484, 134 Pac. 961;
Jenkins v. Oklahoma City, 27 Okla. 230, 111 Pac. 941;
Lensing v. Ponca City, 27 Okla. 297, 112 Pac. 1006;
City of Muskogee v. Rambo, 40 Okla. 672, 138 Pac. 567;
City of Norman v. Allen, 147 Pac. 1002;
Sharum v. City of Muskogee, 43 Okla. 22-32, 141 Pac. 22;
City of Ardmore v. Appollos, 162 Pac. 211;
City of Coalgate v. Gentillini, 152 Pac. 95;
Wey v. City of Hobart, 168 Pac. 433.

In proper cases courts of equity, even from the consequences of unconstitutional acts or ordinances, will refuse relief.

A case in point is *Penn Mutual Life Insurance Company v. Austin*, 168 U. S. 685. That was a suit brought by complainants against the City of Austin, *et al*, to restrain the City of Austin from levying and collecting a tax upon the property of the Austin Water, Light & Power Company to be expended in the construction of a rival system of water works. The Austin Water, Light & Power Company had a contract with the City of Austin to furnish water and light. Complainants were holders of the bonds of the water company. A controversy arose between the city and the water company and the city pro-

ceeded to construct its own water works and to levy and collect taxes for the payment of same, by virtue of an act of the legislature of Texas and of city ordinances passed by the City of Austin authorizing the construction of municipal water works. It was claimed by complainants that the act of the legislature and the city ordinances passed by the city were unlawful and void and unconstitutional as impairing the obligation of the contract between the City and the Water Company. Complainants did not file their suit until the City of Austin had commenced the construction of its municipal plant and expended considerable sums of money therefor and had voted and issued bonds to pay for same.

The lower court sustained a demurrer to the bill. Appeal was taken direct to the Supreme Court, where the case was affirmed. In the opinion by Mr. Justice WHITE the court says:

“Conceding, without deciding, the legality and binding force of the contract as averred in the bill, and that the obligations which it created were materially impaired, not only by a law of the State of Texas, but also by the ordinances, all as alleged; conceding, moreover, without so deciding, that the Austin Water, Light and Power Company was the successor in law of the original corporations, and hence responsible for all their obligations and entitled to all their rights; and, further, conceding that the complainants as bondholders have the capacity to assert the impairment of the contract made by the City of Austin with the City Water Company, it yet be-

comes at the outset necessary to decide whether granting, *arguendo*, all these propositions, the complainants are entitled to the relief which they seek, that is to say, whether they can be heard to invoke the interposition of a court of equity. As a prerequisite to the solution of this question, it is necessary to determine precisely the remedy which it is the purpose of the bill to obtain in order to redress the wrongs which it alleged to exist. Whilst the prayer of the bill asks that the validity of the contract be recognized, and whilst it also prays that the legality of the commutation of taxation created by the city ordinance be decreed, these prayers are made but the foundation or premise for the real relief which the bill invokes; that is, the exercise of the power to enjoin in order thereby to perpetually restrain the City of Austin from completing the water works, by it commenced, and from levying on the property of the Austin Water, Light & Power Company any taxation to be used to complete the new water works. The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

“In *Speidel v. Henrici*, 120 U. S. 377, the court said, speaking through Mr. Justice GRAY:

‘Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. “A court of equity,” said Lord Camden, “has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a

great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing." Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'

"In *Gallihier v. Cadwell*, 145 U. S. 368-371, speaking through Mr. Justice BREWER, it was said:

'The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defence has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all.'

"In *Hammond v. Hopkins*, 143 U. S. 224-250, through Mr. Chief Justice FULLER, the court said:

'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.'

“In *Willard v. Woods*, 164 U. S. 502-524, the court said:

‘But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan v. Portland & Kennebec Railroad*, 94 U. S. 806-811; *Lansdale v. Smith*, 106 U. S. 391-394; *Badger v. Badger*, 2 Wall. 87-95.’

“In *Lane & Badley Co. v. Locke*, 150 U. S. 193, and *Mackall v. Cassilear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary. *Whitney v. Fox*, 161 U. S. 637-647; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573-582; *Abraham v. Ordway*, 158 U. S. 416-423; *Ware v. Galveston City Co.*, 146 U. S. 102-116; *Foster v. Mansfield, Cold Water, etc., Railroad*, 146 U. S. 88-102; *Galliher v. Cadwell*, *supra*, where the earlier cases are fully reviewed; *Hoyt v. Latham*, 143 U. S. 553; *Hanner v. Moulton*, 138 U. S. 486-495; *Richards v. Mackall*, 124 U. S. 183-189.

“The reason upon which the rule is based is not alone the lapse of time during which the

neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Gallihier v. Cadwell, supra*, 372, 'proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' The requirements of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity, will more readily consider laches. The equitable doctrine in this regard is somewhat analogous to the legal rule which holds that where one who has the title in fee to real estate, although he has not been compensated, 'remains inactive and permits them (a railway company) to go on and expend large

sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages.' *Roberts v. Northern Pacific Railroad*, 158 U. S. 1, 11, and authorities there cited. As said in *Gallihier v. Cadwell*, *supra*, 373: 'But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.'

"Do the facts in the case before us bring it within the rules of laches as expounded in the foregoing authorities? The rights of the water company, under its contract, were created long prior to the year 1890. Before that year the water works plant was constructed, and from it the inhabitants of the City of Austin were being supplied with water. The violation of the contract relied upon as impairing its obligations originated in 1890. The first step was the passage of an ordinance submitting to the voters of the city of Austin the proposition whether the bonded debt of the municipality should be increased by the issue of \$1,400,000 of negotiable bonds, the proceeds arising from the sale of such bonds to be used in erecting the new water works. There was nothing clandestine in the conduct of the municipality, since its action was dependent on a municipal election. The holding of the municipal election followed, and, after it had taken place, occurred the passage of the ordinance, directing the issue of the new bonds, and providing that they were to be secured by

the water rates to be collected from the new water works which were to be constructed. From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which the bill alleges was necessarily to result from the action of the municipal authorities. During all this period it does not appear from the bill that the trustee representing the bondholders was ever called upon by them to take any steps whatever to protect their interest. It cannot be said that the bondholders were ignorant of the action and purposes, of the City of Austin, since the bill avers that, conscious of the fact that their rights were to be impaired by the action of the city, they repeatedly called upon the Austin Water, Light and Power Company to take action on the subject, but that that corporation refused so to do, and that the bondholders continued to object to the proposed action of the city without doing anything whatever to protect their legal rights. The bill alleges the issue by the municipal authorities of the series of bonds provided for, since it says, in referring to the tax levied upon the property of the Austin Water, Light and Power Company, that for the purpose 'of providing for the interest and sinking fund on the bonds of the said city of Austin, issued for said purpose,' (that is, the new water works), 'the said City of Austin has levied a tax * * * ' The exact amount of the new bonds which have been issued is not specifically set out in the bill, but it is inferable from the allegations, to which we have just referred, that the whole series have

been issued by the city, since the bill alleges that the taxation has been levied for the purpose of paying the bonds provided by the ordinance. Moreover, that either the whole or a large portion of the bonds have been issued is plainly deducible from other averments in the bill. The ordinance, which is an exhibit to the bill, provides that to pay for the work proposed the bonds should be discounted from time to time as required by the necessities of the situation, that the proceeds arising from their sale should be put to a special fund, and be warranted against by the proper city officer to pay for the work. And the bill avers that the city at great expense has nearly completed a costly dam across the Colorado River as a part of the work provided. The bill therefore presents a case where there has arisen during the existence of the delay a material change in the situation of the parties, and besides is one where rights of third parties have intervened. It cannot be said, under the case made by the bill, that the power of a court of equity can be exerted to forbid the finishing of the water works structure, which the bill alleges has been largely completed, without seriously impairing the rights of the bondholders under the ordinances in question. One of the methods of payment stipulated, as we have seen, for these bonds was the revenue to be derived from the new water works, and of course no such revenues can ever result if the water works are never to be finished. It is certain, then, that if the completion of the new water works be restrained by an injunction, that the interest of the new bondholders will be seriously affected, and that this result will be brought about by a decree of a court of equity rendered in the enforcement

of asserted rights of complainants, who, if they had taken timely action, could have adequately protected themselves from injury without resulting wrong to the rights of many other persons.

“It being clear under such circumstances that the complainants were not entitled to the relief which they sought, it of course follows that:

“The court below did not err in sustaining the demurrer and dismissing the bill for want of equity.”

Penn Mutual Life v. Austin, supra, has been cited and quoted with approval many times, among other cases in *Thatcher v. Board of Supervisors of Polk County, Iowa*, 235 Fed. 728; *New York City v. Pine*, 185 U. S. 100; *Ward v. Sherman*, 192 U. S. 176.

It seems to us all the elements of estoppel on the ground of laches mentioned in *Penn Mutual Life v. Austin, supra*, will be found in this case. It is admitted here that the City of Holdenville pursued the statutory methods for the improvement of streets; that the contract was let, the improvement completed, the money expended, the bonds issued and sold to bona fide investors without a word of protest from complainants. Surely the rights of the parties to this suit have changed and the rights of innocent third persons have intervened.

The Railway Companies have secured the benefit of a street paved with asphalt adjacent to and parallel with the line of their station grounds, adjacent

to which improvement plaintiffs have one of their tracks, and adjacent to which have been located numerous industries on plaintiffs' right of way and station grounds. The City of Holdenville has issued its obligations in the form of bonds to pay for this improvement, and the defendants herein, Spitzer, Rorick & Company and Madison G. Baldwin, have purchased those bonds or some of them relying on the proceedings of the City of Holdenville and on the acquiescence of the complainants in those proceedings and in the assessment of their property to pay for the bonds. Plaintiffs admit they had knowledge and notice of all these proceedings.

It must be conceded that plaintiffs knew their property was assessed and that they knew what portion of their property was assessed to pay for these improvements, and the amount of those assessments, as that is shown by the undisputed testimony of F. P. Rutherford, Mayor of Holdenville at the time of the proceedings, and I. O. Draper, City Clerk. (Rec. pp. 100-106).

We think this case presents even stronger elements of estoppel than *Penn Mutual Life v. Austin*, *supra*. In the *Austin* case the result of the action of the City of Austin was not only to destroy the property of complainants but to assess what might be left of their property to pay for the new water works constructed by the city to take the place of the plant owned by complainants. In that case complainants undoubtedly suffered great injury but because of

their laches and delay in asserting their rights until the City of Austin had issued its obligations and expended large sums of money and the rights of third parties had intervened by the purchase of these bonds, the court held complainants could not recover where recovery would work an injury to the rights either of the City of Austin or of third persons whose interests had intervened.

In the case now under consideration, instead of an injury resulting to plaintiffs they are benefited so far as the record shows, and the court must presume it to be a fact, as it is not questioned, that complainants received benefits to their property at least to the extent of the assessments levied against the same for these improvements. They have not been diligent in asserting their claim that their property is not subject to these assessments. They have waited until the rights of the parties have changed, until they have received the benefit, and the contractor and the bondholders have expended the funds to pay for these improvements to complainants' benefit, and must not now be heard to say that they shall not pay for the improvements constructed.

Truly, the Supreme Court says,

"nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."

We respectfully submit that the decree rendered
in the Circuit Court of Appeals should be affirmed.

JACOB B. FUREY and
GEO. S. RAMSEY,
Muskogee, Okla.,
W. H. HARRIS and
J. W. HARBAUGH,
Toledo, Ohio,
W. T. ANGLIN and
ALFRED STEVENSON,
Holdenville, Okla.,
Attorneys for Appellees.

Appendix.

NOTE: Below we give the sections of the paving law of Oklahoma in force at the time the proceedings were had in the instant case, being the act approved April 17, 1908, found in Session Laws of 1907-8, p. 166, *et seq.*, and being Sections 722 to 728, inclusive, of Compiled Laws of Oklahoma, 1909.]

SEC. 722. *Paving — Grade — Material — Street and Steam Railways.* The mayor and council of cities of the first class are hereby empowered to establish and change the grade of any streets, avenues, lanes, alleys and other public places in such cities, and to permanently improve the same by paving, macadamizing, curbing, guttering and draining the same, including the installing of all manholes, catch basins and necessary drainage pipes whenever, in their judgment, the public convenience may require such improvements, subject only to the limitations prescribed in this act; *provided*, that any change of any grade established by the city shall not be made without making due compensation to the owners of abutting property for any damage thereby caused to the permanent improvements erected thereon, with reference to the previously established grade; *provided, however*, that the failure to make such compensation shall in no wise invalidate the assessments on the property chargeable therewith, as hereinafter provided; *provided further*, that all the street

railway companies operating within the said city shall be required to pave, macadamize, curb, gutter or drain the portion of their track situated in such streets and two feet on each side thereof, as the remainder of said streets may be so improved, or such other material as the city may require, and when there are two or more tracks of any railway or street railway company upon one street, then said company shall be required to gravel, pave or macadamize as the city may require, also the space between said tracks; *provided further*, that when a steam railway company shall occupy any portion of a street with its tracks running in the general direction of such street, either on or adjacent thereto, that the said steam railway company shall improve the space between its said tracks and two feet on either side thereof, in the same manner that said street shall be improved, and the same as is hereby required of street railway companies, and in case any steam railroad or street railway company shall occupy an alley with its track or tracks, such company shall be required to improve, gutter, drain, grade or pave such alley in the manner that may be required by the ordinance of such city, and where any railroad company shall cross with any street that is being or has been paved, the city council may require such railroad company to pave so much of said street as may be occupied by its track or tracks and two feet on each side, and when more than one track crosses such street within a distance of one hundred feet, said railroad company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same

manner as the city may be improving or has improved the other portion of said street, and that the city may require, in addition to the improvement of such streets as herein required, that said railroad company shall construct sidewalks with such material as the city may by ordinance require, upon either or both sides of such street, and that such street car company or railroad company shall maintain such improvements, keeping the same in repair at its own expense, using for such purpose the same material as is used for the original paving, graveling or macadamizing, or sidewalks, or such other material as the city may order, and if the owners of said steam railway or street railway shall fail or refuse to comply with the order of the city to make such improvements by paving, graveling, macadamizing or sidewalking, as the city may direct, or to repair such paving, graveling macadamizing or sidewalking, such work may be done by the city and the cost and expense thereof shall be charged against steam railway or street railway company, and may be collected in the District Court in the county in which such improvements have been made, by action at law, in the name of the city against such steam railway or street railway company, and in any action at law where pleadings are required, it shall be sufficient to declare generally for work or labor done, or material furnished, on the particular street, avenue, alley or highway so improved; in addition to the remedy above provided for the collection of costs and expense of the paving, graveling, macadamizing or sidewalking adjacent to steam and street railway

tracks as herein above provided, the city, or any one authorized by it to do the work, shall be entitled to a lien upon the property of said steam or street railway company, and such lien shall exist for the full amount of said cost and expense against the property of said steam or street railway company adjacent or contiguous to which said improvement or improvements shall be so made and said lien may be enforced against the property of said steam railway or street railway company by action in the District Court for the county in which said improvements have been made, and in any action in equity it shall be sufficient to declare generally that said lien exists for the amount of the cost and expense of the work and labor done or material furnished, on the particular street, avenue, alley or highway so improved. (L. 1907-8, p. 166.)

SEC. 723. *Improvements and Procedure.* When the mayor and council shall deem it necessary to grade, pave, macadamize, gutter, curb, drain or otherwise improve any street, avenue, alley or lane, or any part thereof, within the limits of the city for which a special tax is to be levied as herein provided, said mayor and council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published in six consecutive issues of a daily newspaper or two consecutive issues of a weekly newspaper, published and having general circulation within such city; and if the owners of more than one-half in area of the land liable to assessment to pay for such improvement of any such highway shall not, within fifteen (15)

days after the last publication of such resolution, file with the clerk of said city their protest in writing against such improvement, then the mayor and council shall have power to cause such improvement to be made and to contract therefor and to levy assessments as herein provided, and any number of streets, avenues, lanes, alleys, or other public places or parts thereof to be so improved may be included in one resolution, but such protest or objection shall be made as to each street or other highway separately, *provided*, that if the owners of more than one-half in area of the land liable to assessment for any such improvement shall petition the mayor and council for such improvement of any street or part of street, alley, lane, or avenue not less than one block in length, describing in such petition the character of the improvement desired, the width of the same and the materials preferred by the petitioners for such improvement, it shall thereupon be the duty of the mayor and council to promptly cause the said improvement to be made in accordance with the prayer of said petition, and in such case the resolution hereinbefore mentioned shall not be required; *provided further*, that any property which shall be owned by the city or county in which such is located, or any board of education or school district, shall be treated and considered the same as the property of other owners within the meaning of the provisions of this act, and the property of any city, county, school district and board of education within the district to be assessed, shall be liable and assessed for its proper share of the costs of such improvements, in accord-

ance with the provisions of this act. (L. 1907-8, p. 168.)

An Act to Amend Section 3 of Chapter 10 of Session Laws, 1907-8, of "An Act Entitled, 'An Act to Provide for the Improvement of Streets and Other Public Places Within Cities of First Class, by Grading, Paving, Macadamizing, Curbing, Guttering and Draining the Same,' and Declaring an Emergency. Approved April 17, 1908."

SEC 724. *Property Assessed—Crossings—Property Not Platted.* The lots, pieces or parcels of land fronting and abutting upon any such improvement shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided; *provided*, that in case of an alley extending through a block which shall not be in the center of the block, then assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or

tracts are to be assessed for any such improvements, any part of the cost of such improvements in excess of the benefits accruing to such lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; *provided further*, that the mayor and council, may in their discretion provide for the payment of the cost of improving street intersections and alley crossings, which cost shall be provided for and paid by said city and for the purpose of paying such expenses a special and separate levy shall be made and entered against all the property of the said city at the next annual tax levy, after such estimate is made which said expense shall embrace the pro rata part of the expense of advertising and making profiles and specifications together with the expense charged by the city engineer, superintendents and in all other respects, but the city may at its option, arrange for its payment in three equal annual payments, and the board of appraisers appointed for ascertaining and assessing such costs shall apportion in their assessment a portion of such expense as may be charged to the street or steam railway companies, or either of them, and to the city. If any portion of the property abutting upon such improvement shall not be platted into lots and blocks the mayor and council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment, as herein provided. *Provided*, that whenever the petition provided for in section 2 of this act (723) is presented, or when the mayor and city council shall have determined to pave or improve any street, avenue, lane, alley, or other

public place, and shall have passed the resolution provided for in section 2 of this act (723), that the mayor and council shall then have the power to enact all ordinances and to establish all such rules and regulations as may be necessary to require the owners of all property subject to assessment to pay the cost of such improvement, to cause to be put in and constructed all water, gas, or sewer pipe connections, to connect with any existing water, gas or sewer pipes in and underneath the streets, avenues, lanes and alleys and other public places where such public improvements are to be made, and all costs and expenses for making such connections shall be taxed against such property and shall be included and made a part of the general assessment to cover the cost of such improvement. (L. 1909, H. B. 401.)

SEC. 725. *Resolution—Plans—Contractor's Bond—Advertisement—Publication—Award.* After the expiration of the time for objection or protest on the part of property owners, if no sufficient protest be filed, or on receipt of a petition for such improvement signed by the owners of more than one-half in area of the land to be assessed, if such petition shall be found to be in proper form and properly executed, the mayor and council shall adopt a resolution reciting that no such protest has been filed, or the filing of such petition, as the case may be, and expressing the determination of the council to proceed with the improvement, defining the extent, character and width of the improvement, stating the material to be used and the manner of construction and such other matters as shall be necessary, to instruct the

engineer in the performance of his duties in preparing for such improvement, the necessary plans, plats, profiles, specifications and estimates. Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and the performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

Said resolution shall also direct the city clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. The notice for such proposals shall state the street, streets or other public places to be improved, the kinds of improvements proposed, what, if any, bond or bonds will be required to be executed by the contractor as aforesaid and shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by the mayor and council.

Said notice shall be published in ten consecutive issues of a daily newspaper or two consecutive issues of a weekly newspaper published and of general circulation in said city.

At the time and place specified in such notice, the mayor and council shall examine all bids received and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected and perform all the conditions imposed by the mayor and council as prescribed in such resolution and notice for proposals, which contract shall in no case exceed the estimate of cost submitted by the engineer with the plans and specifications, and the mayor and council shall have the right to reject any and all bids and to re-advertise for other bids when any such bids are not in their judgment, satisfactory (L. 1907-8, p. 170).

726. *Appraisers—Reports—Complaints—Assessments—Bonds.* As soon as the contract is let and the cost of such improvement, which shall also include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained the mayor and council, shall, by resolution, appoint a board of appraisers, to appraise and apportion the benefits to the several lots and tracts of land which shall be designated in said resolution, which board of appraisers shall consist of three disinterested freeholders of the city, not owners of any property to be assessed, and it shall be the duty of said appraisers, within five days after being notified of their ap-

pointment to proceed to appraise and apportion the benefits, to such lots and tracts of land as shall have been designated by the council, after having taken and subscribed an oath to make a true and impartial appraisement and apportionment, and a written report of such appraisement and apportionment shall be returned and filed with the city clerk within ten days from the date of the appointment of such appraisers. Such appraisers shall each be paid not to exceed five dollars for each day while actually employed in such service. *Provided*, that, the acts of a majority of said appraisers, shall have like force and effect as the act of all. When said report shall have been so returned, the mayor and council shall appoint a time for holding a session on some day to be fixed by them to hear any complaints or objections that may be made concerning the appraisement and apportionment as to any of such lots or tracts of land, and notice of such session shall be published by the city clerk in five successive issues of a daily newspaper or two issues of a weekly newspaper published and of general circulation in said city and the time fixed for said hearing shall be not less than five, nor more than ten days from the last publication. The mayor and council at said session shall have the power to review, and correct said appraisement and apportionment and to raise or lower the same, as to any lots or tracts of land as they shall deem just, and shall, by resolution, confirm the same as so revised and corrected by them. Assessments in conformity to said appraisement and apportionment as corrected and confirmed by the council shall be payable in ten

equal annual installments, and shall bear interest at the rate of seven per cent per annum until paid, payable in each year at such time as the several installments of the assessments are made payable each year. The mayor and council shall by ordinance levy assessments in accordance with said appraisement and apportionment as so confirmed against the several lots and tracts of land liable therefor.

The first installment of said assessments, together with interest to that date upon the whole shall be due and payable on the first day of September next succeeding the passage of said ordinance and one installment, with the yearly interest upon the amounts remaining unpaid, shall be payable on the first day of September, in each succeeding year until all shall be paid, *provided, however*, that in case said assessment and interest is not paid when due, the assessment so matured and unpaid shall bear interest at the rate of eighteen per centum per annum, until paid, *provided, further*, that if such assessing ordinance shall be passed after the first day of August in any year, the first installment of such assessment and interest shall be due and payable on September first of the following year. Said ordinance shall also provide that the owners of the property so assessed shall have the privilege of paying the amounts of their respective assessments within thirty days from the date of the passage of said ordinance. The owners of property so assessed shall be allowed to make payment of their respective assessments without interest within said period of thirty days to the city clerk and thereby relieve their prop-

erty from the lien of said assessment, which money so paid to the city clerk shall be by him disbursed pro rata between the contractor and the city in proportion to the respective interests.

Such special assessments and each installment thereof, and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed, from the dates of the ordinances levying the same co-equal with the lien of other taxes, and prior and superior to all other liens against such lots or tracts and such lien shall continue until such assessment and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty.

The mayor and council, after the expiration of said thirty days, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date fifteen days after the passage of the ordinance levying the assessments and of such denominations as the mayor and council shall determine, which bond or bonds, shall in no event become a liability of the city issuing the same.

One-tenth in amount of any such series of bonds, with the interest upon the whole series to that date, shall be payable on the fifteenth day of September next succeeding the maturity of the first installment of the assessments and interest and one-tenth thereof with the yearly interest upon the whole amount remaining unpaid, shall be payable on the fifteenth day of September in each succeeding year until all shall be paid. Such bonds shall bear interest at a

rate not exceeding six per cent per annum from their date until maturity, payable annually and ten per cent from maturity until paid, and shall be designated as "Street Improvement Bonds," and shall on the face thereof recite the street or streets, part of street or streets or other public places, for the improvement of which they have been issued, and that they are payable solely from assessments which have been levied upon the lots and tracts of land benefited by said improvement under authority of this act. Said bonds shall be signed by the mayor and attested by the city clerk of said city and shall have the impression of the corporate seal of such city thereon, and shall have interest coupons attached, and all bonds issued by authority of this act shall be payable at such place either within or without the State of Oklahoma as shall be designated by the council.

Said bonds shall be sold at not less than par, and the proceeds thereof applied to the payment of the contract price and other expenses, by the mayor and council, or such bonds in the amount that shall be necessary for that purpose may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract, and the portion thereof which shall be necessary to pay other expenses incident to and incurred in providing for said improvement shall be sold or otherwise disposed of as the mayor and council shall direct. Said bonds shall be registered by the city clerk of the city issuing them in a book to be provided for that purpose and certificates of registration by said city clerk

shall be endorsed upon each of said bonds. (L. 1907-S, p. 172.)

SEC. 727. *Collection, Payment and Notice of Assessment — Delinquents.* The assessments provided for and levied under the provisions of this act shall be payable by the persons owing the same as the several installments become due, together with the interest thereon, to the city clerk of such city, who shall give proper receipts for such payments. The city clerk shall be required to execute a good and sufficient bond with sureties, and in an amount to be approved by the mayor and council, payable to the city conditioned for the faithful performance of the duties enjoined upon him by this act as collector of said assessments.

It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily, the amounts of such assessments collected by him and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose.

It shall be the duty of such city clerk, not less than thirty days and not more than forty days, before maturity of any installment of such assessments to publish in two successive issues of a daily paper, or in one issue of a weekly newspaper, published and of general circulation in said city, a notice advising the owner of the property affected by such assessment of the date when such installment and

interest will be due and designating the street, streets or other public places for the improvements of which such assessments have been levied and that unless the same shall be promptly paid shall bear interest at the rate of eighteen per cent per annum thereafter until paid, and proceedings taken according to law to collect said installment and interest; and it shall be the duty of the city clerk promptly after the date of maturity of any such installment of assessment and interest and on or before the fifteenth day of September in each year to certify said installment and interest then due to the county treasurer of the county in which said city is located, which installment of assessment and interest shall be by said county treasurer placed upon the delinquent tax list of said county for the current year and collected as other delinquent taxes are collected and thereupon pay to the city treasurer for disbursement in accordance with the provisions of this act; *provided*, that failure of the city clerk to publish said notice of the maturity of any installment of said assessment and interest shall in no wise affect the validity of the assessment and interest (L. 1907-8, p. 175).

SEC. 728. *Suits.* No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessments, or issuing such bonds, or providing for their payments as herein authorized, or contesting the validity thereof on any ground or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in section two

(723) in cases requiring such resolution and its publication and to give the notice of the hearing on the return of the appraisers provided for in section five (726) unless such suit shall be commenced within sixty (60) days after the passage of the ordinance making such final assessment; *provided*, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment. (L. 1907-8, p. 176.)

Statement of the Case.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY ET AL. v. MACKEY, AS COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 211. Argued April 21, 1921.—Decided June 1, 1921.

1. The railroad right of way and station grounds here in question, now constituting, with the consent of Congress, parts of a through line of an extensive interstate system, are not exempt from state special tax assessments upon the ground that they are parts of a federal instrumentality, though originally granted by Congress with a purpose to develop coal lands of the Choctaw Nation, and though coal mines leased from the tribe are served by the railroad. P. 535.
 2. A special assessment for a street improvement, levied by a city under Oklahoma Comp. Laws, 1909, § 724, on railroad property abutting on the improved street and designated on a map prepared by the city engineer, *held* to have sufficiently identified the property. P. 537.
 3. The removal of such map from the city files and its possession meanwhile by purchasers of the improvement bonds, did not invalidate the assessment, the railroad companies not having been injured or misled by its absence and having had full knowledge of the assessment proceedings and the improvement. P. 538.
 4. A railroad right of way and station grounds in Oklahoma, owned by a company in fee but subject to a right of reverter in the Creek Nation in case they cease to be used for railroad purposes, are liable to special assessment, under the Oklahoma laws, for a street improvement enhancing the value of the railroad use. P. 538.
- 261 Fed. Rep. 342, affirmed.

THIS was a suit brought in the District Court by the present appellants to avoid and enjoin enforcement of a special street improvement tax. The appeal is from a judgment of the Circuit Court of Appeals reversing a

judgment in their favor. The facts are stated in the opinion, *post*, 534.

Mr. C. O. Blake, with whom *Mr. W. R. Bleakmore*, *Mr. R. A. Tolbert*, *Mr. Roy St. Lewis*, *Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* were on the brief, for appellants:

The purpose of the acts of Congress was not alone to provide transportation, but both acts have as their principal object the development of the coal lands belonging to the Indians, and to this end the purchasers of the property and franchises of the Coal Company were authorized to organize and become a federal corporation, with the rights, immunities, powers and duties of the Coal Company, which was primarily a mining company with the power to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation of any mine or quarry owned or operated by the corporation. By these acts of the Government, accepted by the companies, the premises sought to be charged with the assessment were impressed with a duty in relation to the congressional purpose, which would be obstructed by the sale, apart from the franchise, of portions of the lands so devoted to such use. The appellants were more than ordinary common carriers, in that they were charged and entrusted with a duty to accomplish the operation of the mines identified in the acts of Congress, and to transport the products thereof, as well as the United States mail.

The nature and purpose of such grants as those made to the Coal Company and to the Choctaw Company and of the estate thereby conferred have been definitely settled by this court. *Chicago &c. Ry. Co. v. United States*, 217 U. S. 180; *Spokane & B. C. Ry. Co. v. Washington & Great Northern Ry. Co.*, 219 U. S. 166; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267.

This contention, that the way and grounds were not subject to assessment, is supported by the decision in *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292.

It is true that the court was there speaking more with reference to the mining of the coal than the transportation thereof, but the mining and the transportation are inseparably connected and it was as much the duty of the Government to see that the avenues of transportation for which it, as guardian of the interest of the Indians, had appropriated a portion of their lands, were kept open and that the lands of the Indians which were taken for rights of way and station grounds were held intact, as it was to see that the coal mines were opened and operated.

At the time of the making of the grants to the Coal Company and its successor, the Choctaw Company, and of the authorization of the letting to the Rock Island Company, there was in effect in the United States a rule of property, arising out of the decision of this court in the case of *East Alabama Ry. Co. v. Doe*, 114 U. S. 340, that no part of the right of way of a railway line may be sold under process separate from the franchise under which it is held.

There are numerous state decisions to the contrary, but they are in the minority and do not relate to congressional grants. It is fair to assume that Congress, in granting the way and grounds, incorporated as integral parts thereof the rule of property so disclosed by the highest court and generally accepted in the courts of the land. We do not think that this court has since shown any disposition to change the rule so established. *Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442; *Buncombe County Commissioners v. Tommey*, 115 U. S. 122.

It may be said that no intention should be imputed to Congress to empower or suffer the State or its municipalities to dismember the thoroughfare so secured, either

with or without the consent of private investment therein. Congress was creating a public thoroughfare for all of the general uses and for a specific use to which a special interest of the Government and of the Indian nations attached.

The grantee and its lessees and assigns, in fact all persons, were forbidden to use the granted ways and grounds for any other purposes.

The proceedings to make and enforce the assessment were not such as to afford due process of law.

The state laws did not authorize the assessment.

Mr. Jacob B. Furry, with whom *Mr. Geo. S. Ramsey*, *Mr. W. H. Harris*, *Mr. J. W. Harbaugh*, *Mr. W. T. Anglin* and *Mr. Alfred Stevenson* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the United States District Court for the Eastern District of Oklahoma by the Chicago, Rock Island & Pacific Railway Company to have declared void a special assessment for street improvement made against part of its right of way and station grounds in the City of Holdenville, Oklahoma, and to enjoin the taking of any proceedings to enforce the same. The Choctaw, Oklahoma & Gulf Railroad Company, the lessor, was joined as plaintiff. The defendants are the county treasurer, the city, and holders of bonds issued to pay for the improvement. The street improved, called Oklahoma Avenue, runs parallel to the main tracks. The station grounds abut on the Avenue for a distance of 1641 feet, and the parcel assessed extends back from the Avenue 150 feet to the centre of the right of way. Over this street a large part of the traffic to and from the station necessarily passes. For between it and the main

tracks lie the passenger depot, the freight houses, the express office, the cotton platform, an oil warehouse, grain elevators, coal bins and the team tracks. The assessment is assailed as invalid on several grounds. The chief contention is that the property is immune from assessment by the State because that part of the railroad was an instrumentality of the Federal Government. The other grounds of attack are that in laying the assessment the property was not sufficiently identified, and that the assessment of a railroad right of way and station grounds is not authorized by the law of the State. The District Court entered a decree for plaintiffs which was reversed by the Circuit Court of Appeals with directions to dismiss the bill. 261 Fed. Rep. 342. The case comes here under § 241 of the Judicial Code.

First. The claim of immunity from assessment rests upon these facts: The right of way and station grounds are on land which had belonged to the Creek Nation before the town (now city) was established under direction of the Secretary of the Interior, pursuant to the original Creek Agreement. Act of March 1, 1901, c. 676, § 10, 31 Stat. 861, 864. The Rock Island acquired its interest on March 24, 1904, under a lease from the Choctaw, Oklahoma & Gulf, for a period of 999 years, of all of its railroad property. The lessor company had in locating its railroad through Holdenville taken, besides the right of way 100 feet wide, an additional strip for station purposes 200 feet wide with a length of 3,000 feet; having acquired the power so to do by succeeding to the powers and franchises of the Choctaw Coal and Railway Company. To that company Congress had in 1888 granted the right to build a railroad in Indian Territory, with a branch line to coal mines leased from the Choctaw Nation.¹

¹ Act of Congress, February 18, 1888, c. 13, 25 Stat. 35. Section 2, provides:

"That said corporation is authorized to take and use for all purposes

The contention is that the railroad is an instrumentality through which the Government undertook to perform its obligation to develop coal lands belonging to the Indians; and that, if the railroads' interest in the right of way and station grounds could be subjected to a special assessment and possible sale thereunder apart from the railroad franchises, the congressional purpose might be obstructed. *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292; see also *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522.

The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation. The most that can be said here is that among the public served by this railroad are some mines on land leased from the Choctaw Nation. The right of way and station grounds in question, instead of being as was perhaps originally contemplated by the Act of February 18, 1888, part of a branch to leased "coal veins," have become an integral

of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road. . . .

"*Provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."

See also Acts of February 13, 1889, c. 152, 25 Stat. 668; October 1, 1890, c. 1252, 26 Stat. 640; February 21, 1891, c. 249, 26 Stat. 765; January 22, 1894, c. 14, 28 Stat. 27; August 24, 1894, c. 330, 28 Stat. 502; April 24, 1896, c. 122, 29 Stat. 98; March 28, 1900, c. 111, 31 Stat. 52.

part of through lines of a great railroad system.¹ Holdenville is on the main line of the Choctaw, Oklahoma and Gulf which extends from the west bank of the Mississippi River through Arkansas and Oklahoma to the Texas state line, a distance of nearly 650 miles. By the lease to the Rock Island, this railroad has become a part of the through lines of a much larger system. And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians the tax upon the railroad property would be none the less valid. *Railroad Co. v. Peniston*, 18 Wall. 5, 36; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 546-548; *Central Pacific R. R. Co. v. California*, 162 U. S. 91, 125; *Thomas v. Gay*, 169 U. S. 264.

Second. Equally unfounded is the contention that the assessment did not sufficiently identify the property, and was hence a denial of due process of law. The Oklahoma statute under which the assessment was made (Comp. Laws, 1909, § 724), provides that:

"If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block districts for the purpose of appraisalment and assessment, as herein provided."

The railroad premises not having been platted, the Mayor and Council adopted a map of the city engineer, on which the right of way and station grounds were set forth in proper quarter block districts. The premises

¹ When Congress authorized the purchasers of the property and franchises of the insolvent Choctaw Coal and Railway Company to reorganize as the Choctaw, Oklahoma and Gulf, it conferred upon the latter "perpetual succession." Act of August 24, 1894, c. 330, § 5, 28 Stat. 502, 503. Later it greatly enlarged its powers, conferring authority without limit, to construct its railroad over any Indian reservation and to acquire and consolidate with practically any connecting line. Acts of April 24, 1896, c. 122, 29 Stat. 98; March 28, 1900, c. 111, 31 Stat. 52.

assessed were those quarter blocks thereon designated as abutting on that portion of Oklahoma Avenue which was improved; and the designation was clear. Some time after the passage of the ordinance providing for the assessment this map was inadvertently removed from the city files, sent to the purchasers of the bonds issued for the improvement, and not returned until after the lapse of a considerable time. But the railroad companies had full knowledge of the proceedings relating to the assessment and of the commencement, the progress and the completion of the improvement. There is not even a suggestion that they were injured or misled by the temporary absence of the map from the city files. Such removal did not invalidate the assessment. Furthermore, mere insufficiency of description or other irregularity in the proceeding would not entitle abutting landowners to the relief sought here. Their right would be limited to having the Mayor and Council make a reassessment conforming to the regulations prescribed by the statute. See *Oklahoma Laws, 1907-8*, p. 176, §§ 7-8; *Oklahoma Ry. Co. v. Severns Paving Co.*, 251 U. S. 104.

Third. The remaining contention is that the statutes of the State do not authorize assessment for betterments upon a railroad right of way and station grounds. The mere fact that there is a possible right of reverter in the Creek Nation does not preclude the railroad's interest from being subject to general taxation; see *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375; *Maricopa & Phoenix R. R. Co. v. Arizona*, 156 U. S. 347, 352. The railroad's interest, as stated in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee." In

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effect the railroad is the absolute owner of the land. Its use is, and necessarily must be, exclusive. The betterment for which the assessment was levied is of a nature to enhance the value of that use. And it is the railroad, as distinguished from the Creek Nation, owner of a possible reversionary interest, to which the benefit from the improvement enures. For the railroad's use will continue indefinitely, while the specific improvement to be paid for can have but a short life.

Street paving is a class of betterment to which the railroad right of way and station property is generally held to be subject. See *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U. S. 430; *Branson v. Bush*, 251 U. S. 182. The rule appears to have been accepted in Oklahoma. Compare *Missouri, Kansas & Texas Ry. Co. v. Tulsa*, 45 Oklahoma, 382; *Oklahoma Ry. Co. v. Severns Paving Co.*, 251 U. S. 104. It is urged that, if the assessment is left unpaid, a sale to enforce the lien would sever an integral part of the railway. The same objection might be urged against the validity of a lien for general taxes locally assessed upon railroad property or a mechanic's lien upon the same. The objection is clearly unsound. Compare *Kansas City Southern Ry. Co. v. Tansey*, 41 Oklahoma, 543; *Kansas City Southern Ry. Co. v. Rosier*, 38 Oklahoma, 231; *Kansas City Southern Ry. Co. v. Wallace*, 38 Oklahoma, 233. If the validity of the assessment is established, it may be assumed that due payment will follow. At all events we have no occasion to deal now with the method and means to be pursued in enforcing it.

Affirmed.